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Calendar No. 662

97TH CONGRESS
2d Session

SENATE

REPORT
No. 97-466

VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT

REPORT

OF THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 349

JUNE 8, 1982.—Ordered to be printed
Filed, under authority of the orders of the Senate of May 12 (legislative day, May 11), 1982 and of June 8, 1982

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Mr. SIMPSON, from the Committee on Veterans' Affairs, submitted the following

REPORT

[To accompany S. 349]

The Committee on Veterans' Affairs to which was referred the bill (S. 349) to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a committee substitute, and recommends that the bill, as amended, do pass.

COMMITTEE AMENDMENT

The amendment is as follows:

Strike out all after the enacting clause as follows:

[That (a) this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

[(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

[TITLE I—ADJUDICATION PROCEDURES

[SEC. 101. (a) Chapter 51 is amended by adding at the end of subchapter I thereof the following new section:

["§ 3007. Burden of proof; benefit of the doubt

["(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded.

["(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration on a claim for any benefit under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.".

[(b)(1) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title are each amended by striking out in the item relating to chapter 51 "Applications" and inserting in lieu thereof "Claims.".

[(2) The heading of such chapter is amended to read as follows:

["CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS".

[(c)(1) The table of sections at the beginning of such chapter is amended by striking out in the item relating to subchapter I "APPLICATIONS" and inserting in lieu thereof "CLAIMS".

[(2) The heading of subchapter I of such chapter is amended to read as follows:

["Subchapter I--Claims".

[(d) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 3006 a new item as follows:

["3007. Burden of proof; benefit of the doubt.".

[SEC. 102. Section 3311 is amended by adding at the end thereof the following new sentence: "Subpenas authorized under this section shall be served by an individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing by registered or certified mail addressed to such individual's last dwelling place or principal place of business. A verified return by the individual so serving the subpena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service.".

[SEC. 103. Section 4001 is amended by—

[(1) amending subsection (a) by striking out "(not more than fifty)" and inserting in lieu thereof "(not more than sixty-five", striking out "associate", and inserting before the period at the end of the second sentence "in a timely manner"; and

[(2) adding at the end thereof the following new subsection:

["(c) The Chairman shall submit a report to the appropriate committees of the Congress, not later than February 1, 1980, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the twenty-four months preceding the prior fiscal year and the then current fiscal year, respectively, the average length of time a case was before the Board between the time of filing of an appeal and the disposition during the prior fiscal year, and the number of members and other professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each

such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as required by subsection (a) of this section.".

[SEC. 104. Section 4002 is amended by striking out "associate" wherever it appears.

[SEC. 105. Subsections (a) and (b) of section 4003 are amended by inserting a comma and "after notice to the claimant of such additional information together with an opportunity to be heard in connection with such information," after "concerned" both places it appears.

[SEC. 106. Section 4004 is amended by—

[(1) inserting before the period at the end of the second sentence in subsection (a) "after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law";

[(2) amending subsection (b) by striking out "in the form of official reports from the proper service department" and adding at the end thereof, the following new sentence: "A judicial decision upholding, in whole or in part, the disallowance of a claim under chapter 72 of this title shall not diminish the Board's discretionary authority under this subsection to reopen the claim and review the Board's former decision."; and

[(3) amending subsection (d) to read as follows:

["(d) After reaching a decision in each case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

["(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact, law, and matters of discretion presented on the record; and

["(2) an order granting appropriate relief or denying relief.".

[SEC. 107. Paragraph (5) of subsection (d) of section 4005 is amended by striking out "will base its decision on the entire record and".

[SEC. 108. Section 4009 is amended by adding after subsection (b) the following new subsection:

["(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and, after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. If the Board denies the request of such claimant for such an opinion, the Board shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for its determination. Actions of the Board under this subsection, including any such denial, shall be final and conclusive and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, chapter 72 of this title to the contrary notwithstanding.".

[SEC. 109. (a) Chapter 71 is further amended by adding at the end thereof the following new sections:

["§ 4010. Adjudication procedures

["(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence.

["(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator, under regulations of the Administrator, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

["(c) In the course of any proceeding before the Board, any party to such

proceeding or such party's authorized representative shall be afforded opportunity—

"(1) at a reasonable time prior thereto as well as during such proceeding, to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

"(2) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations of the Administrator, pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

"(3) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

"(4) to submit rebuttal evidence;

"(5) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

"(6) to serve written interrogatories on any person, including employees of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Administrator by the person to whom the interrogatories are directed or such person's representative.

The fee provided for in clause (1) of this subsection may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on account of the party's inability to pay or for other good cause shown. In the event of any objection, filed under clause (6) of this subsection, the Administrator shall, pursuant to regulations which the Administrator shall prescribe establishing standards consistent with standards for protective orders under rule 26(c) of the Rules of Civil Procedure for the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Administrator shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered. If any person upon whom interrogatories are served under this section fails to answer or fails to provide responsive answers to any such interrogatories within thirty days after service or such additional time as the Administrator may allow, the Administrator shall, upon a statement or showing by the party who served such interrogatories of general relevance and reasonable scope of the evidence sought, issue a subpena pursuant to section 3311 of this title (with enforcement of such subpena to be available pursuant to section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within one hundred miles of where such person resides, is employed, or transacts business.

"(d) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration may at any time disqualify himself or herself, on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator shall determine the matter as a part of the record and decision in the case.

"(e) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board shall constitute the exclusive record for decision in accordance with section 4004(a) of this title, and shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places and, on the payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on account of the party's inability to pay or for other good cause shown.

"(f) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator under this title for the purpose of administering veterans' benefits shall be exclusive with re-

spect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

["§ 4011. Notice of procedural rights

["In the case of any denial, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with denial after an initial review or determination and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notices shall be on such forms as the Administrator shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration, (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, and (3) such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.".

[(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following new items:

["4010. Adjudication procedures.
["4011. Notice of procedural rights.".

[SEC. 110. (a) In order to evaluate the feasibility and desirability of alternative methods of (1) assuring the resolution of claims before the Administrator of Veterans' Affairs for benefits under laws administered by the Veterans' Administration as promptly and efficiently as feasible following the filing of a notice of disagreement pursuant to section 4005 (as amended by section 107 of this Act) or 4005A of title 38, United States Code, and (2) affording claimants the opportunity for a hearing before or review by a disinterested authority at a location as convenient and on as timely basis as possible for each claimant, the Administrator shall conduct a study for a period of between twenty-four and thirty-six months, in at least six geographic areas and at at least six regional offices of the Veterans' Administration, involving two alternative methods for resolution of claims.

[(b)(1) In at least three such geographic areas, the Administrator shall provide an intermediate-level adjudication process whereby each claimant may, within the time afforded such claimant under paragraph (3) of such section 4005(d) or 4005A(b) to file an appeal, request a de novo hearing at the agency of original jurisdiction (as described in section 4005(b)(1) of such title 38) before a panel of three Veterans' Administration employees, each of whose primary responsibilities include adjudicative functions but none of whom shall have previously considered the merits of the claim at issue. Following such hearing, such panel shall render a decision and prepare a new statement of the case in accordance with the requirements of paragraphs (1) and (2) of such section 4005(d). Such new statement of the case shall, for all purposes relating to appeals under chapter 71 of such title 38, be considered to be a statement of the case as required by paragraph (1) of such section 4005(d).

[(2) In at least three other such geographic areas, the Administrator shall provide for an enhanced schedule of visits, on at least a quarterly basis each year, by a panel or panels of the Board of Veterans' Appeals to conduct formal recorded hearings pursuant to such section 4002 in such areas.

[(c) Not later than forty-two months after the date of enactment of this Act, the Administrator shall report to the Congress on the results of this study, including an evaluation of the cost factors associated with each alternative on an annual basis, the impact on the workload of the regional office in question, the impact on the annual caseload of the Board of Veterans' Appeals resulting from both alternatives, together with any recommendations for administrative or legislative action, or both, as may be indicated by the results of such study.

[TITLE II—VETERANS' ADMINISTRATION RULE MAKING

[SEC. 201. (a) Subchapter II of chapter 3 is amended by adding at the end thereof the following new section:

["§ 221. Rule making

["Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator shall be subject to the requirements of section 553 of title 5.".

[(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following:

["221. Rule making.".

[TITLE III—JUDICIAL REVIEW

[SEC. 301. Subsection (a) of section 211 is amended by striking out "sections 775, 784" and inserting in lieu thereof "sections 775 and 784" and inserting in lieu thereof "sections 775 and 784 and chapter 72 of this title".

[SEC. 302. (a) Part V is amended by adding after chapter 71 the following new chapter:

["CHAPTER 72—JUDICIAL REVIEW

["Sec.
["4025. Jurisdiction.
["4026. Scope of review.
["4027. Remands.
["4028. Survival of actions.
["4029. Appellate review.

["§ 4025. Jurisdiction

["(a) Except as provided in subsection (h) of this section, after any final decision of the Administrator (as defined in subsection (c) of this section) adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within 180 days after the mailing to the claimant of notice of such decision pursuant to section 4004 of this title. Such action shall be brought against the Administrator in the district court of the United States for the judicial district in which the plaintiff resides or the plaintiff's principal place of business is located, or in the district court of the United States for the judicial district where the principal offices of the Board of Veterans' Appeals (established under section 4001 of this title) are located.

["(b) In any matter not directly involving a claim for benefits under any law administered by the Veterans' Administration, section 211(a) of this title shall not operate as a bar to a civil action otherwise authorized by law.

["(c) For the purposes of this chapter, 'final decision of the Administrator' means—

["(1) a final determination of the Board of Veterans' Appeals pursuant to section 4004 (a) or (b) of this title; or

["(2) a dismissal of an appeal by the Board of Veterans' Appeals pursuant to section 4005 or 4008 of this title.

["(d) The provisions of this chapter shall not apply to matters arising under chapters 19 and 37 of this title.

["(e) The complaint initiating an action under subsection (a) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's Veterans' Administration records.

["(f) The Administrator shall file, together with the answer to a complaint filed pursuant to subsection (a) of this section, a certified copy of the records upon which the findings of fact and decision complained of are based, or if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administator to file certified copies of such indexed items as the court deems revelant to its consideration of the case.

["(g) In an action brought pursuant to subsection (a) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (f) of this section, to enter judgment in accordance with section 4026 of this title or remand the cause in accordance with section 4026 or 4027 of this title.

["(h) No action may be brought under this section as to which the initial claim for benefits is filed pursuant to section 3001(a) of this title after the last day of the fifth fiscal year beginning after the effective date of this section.

["§ 4026. Scope of review

["(a) In any action brought under section 4025 of this title, the reviewing court to the extent necessary to its decision and when presented, shall—

["(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions;

["(2) compel action of the Administrator unlawfully withheld; and

["(3) hold unlawful and set aside decisions, findings, and conclusions of the Administrator found to be—

["(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

["(B) contrary to constitutional right, power, privilege, or immunity;

["(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

["(D) without observance of procedure required by law.

[If the reviewing court finds the Administrator's finding on an issue or issues of fact to be arbitrary, capricious, or an abuse of discretion, the court shall specify where it finds the record to be deficient and shall, prior to entering any judgment reversing such decision, remand the case a single time to the Administrator for further action not inconsistent with the court's order. In so remanding, the court shall specify a reasonable period within which the Administrator shall complete the required action and, if such action is not completed within the time specified by the court, the matter shall be returned to the court for its action.

["(b) In making the determinations under subsection (a) of this section, the court shall review the whole record before the court pursuant to section 4025(f) of this title or those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

["(c) In no event shall findings of fact made by the Administrator be subject to trial de novo by the reviewing court.

["(d) When a final decision of the Administrator (as defined in section 4025(c) of this title) is rendered in any case and such decision is adverse to a party solely because of the failure of such party to comply with any applicable regulation of the Veterans' Administration, the court shall review only questions raised as to compliance with and the validity of the regulation.

["§ 4027. Remands

["In any action brought under section 4025 of this title, the reviewing court shall, on motion of the Administrator made before the expiration of the time specified for the filing of an answer to a complaint filed pursuant to subsection (a) of such section, allow a single remand of a case to the Administrator for further review by the Administrator. If such review is not completed within ninety days after the date of such remand, the matter shall be returned to the court for its action. At any time after the Administrator files an answer, the court may, in the exercise of its discretion, remand the case to the Administrator for further action by the Administrator and, if either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Administrator and order such additional evidence to be taken by the Administrator; in either case, the court may specify a reasonable period of time within which the Administrator shall complete the required action. After a case is remanded to the Administrator, and after further action by the Administrator, including consideration of any additional evidence, the Administrator shall modify, supplement, or affirm the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, or affirmation of findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, or affirmation was based. Any such modification, supplementation, or affirmation of the findings of fact or decision shall be reviewable by the court only to the extent provided in section 4026 of this title with respect to the review of the original findings of fact and decision.

["§ 4023. Survival of actions

["Any action brought under section 4025 of this title shall survive, notwithstanding any change in the person occupying the Office of the Administrator or any vacancy in such office.

["§ 4029. Appellate review

["The decisions of a district court pursuant to this chapter shall be subject to appellate review by the courts of appeals and the Supreme Court of the United States in the same manner as judgments in other civil actions.".

[(b) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part V are each amended by adding below the item relating to chapter 71 a new item as follows:

["72. Judicial Review ..... 4025".

[SEC. 303. Subsection (d) of section 1346 of title 28, United States Code, is amended by inserting before the period at the end thereof "except as provided for in chapter 72 of title 38".

[TITLE IV—ATTORNEYS' FEES

[SEC. 401. Section 3404 is amended by—

[(1) amending subsection (c) to read as follows:

["(c) The Administrator, pursuant to regulations which the Administrator shall prescribe, may determine and approve payment of reasonable attorneys' fees to be paid by the claimant, to attorneys recognized under this section, for services rendered in representing an individual before the Veterans' Administration in connection with claims for benefits under laws administered by the Veterans' Administration. In no event shall such attorneys' fee, determined and approved by the Administrator, exceed—

["(1) for any claim resolved prior to the claimant's receipt of a statement of the case pursuant to section 4005(d) of this title, $10; or

["(2) for any claim resolved following the claimant's receipt of such statement of the case, an amount in excess of the lesser of—

["(A) the fee agreed upon by the claimant and the attorney; or

["(B)(i) $500, or a greater amount specified in regulations prescribed by the Administrator based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Administrator may, in the Administrator's discretion, determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee; or

["(ii) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 per centum of the total amount of any past-due benefits awarded on the basis of the claim."; and

[(2) adding at the end of such section the following new subsections.

["(d) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court may determine and approve as part of its judgment a reasonable fee for the representation of such claimant in such action. When the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the matter is resolved in a manner favorable to the claimant, the fee so determined and approved shall not exceed 25 per centum of the total amount of any past-due benefits awarded on the basis of the claim. If, in such an action, the matter is not resolved in a manner favorable to a claimant, the court may determine and approve as part of its judgment a reasonable fee, taking into consideration the extent to which there could have appeared to have been a reasonable probability of success for such an action at the time it was filed, for the representation of such claimant not in excess of $750.

["(e) To the extent that past-due benefits are awarded in proceedings before the Administrator or by a court, the Administrator shall direct payment of any attorney's fee that has been determined and approved under this section out of such past-due benefits, but in no event shall the Administrator withhold any portion of benefits payable for a period subsequent to the date of the decision of the Administrator or court making such award.

[“(f) The determination and approval by the Administrator regarding attorneys' fees pursuant to subsection (c) of this section may be reviewed by a court only to determine whether the Administrator's action constituted an abuse of discretion. Review of the determination and approval by either the Administrator or the court regarding an attorney's fee shall be obtained as follows:

[“(1) For an award in conjunction with a claim before the Administrator pursuant to subsection (c) of this section, by an action brought, within thirty days after the date of notice of such award, by either the claimant or the attorney in the district court of the United States in the judicial district in which the claimant resides or the claimant's principal place of business is located.

[“(2) For an award in conjunction with a claim approved by a United States court pursuant to subsection (d) of this section, on a motion made, within thirty days after the date of such award, by either the claimant or the attorney in the district court of the United States where the appeal was considered.

[For actions brought under clause (1) of this subsection, the Administrator shall be named as the defendant, but notice of any such action shall also be given to all parties in interest and all such parties shall be heard by the court reviewing the award.

[“(g) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are otherwise controlling.

[“(h) For the purposes of subsections (c) and (d) of this section, claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

[“(i) In an action brought under section 4025 of this title, the court, in its discretion, may, as an extraordinary remedy, allow the prevailing party, other than the Administrator, reasonable attorneys' fees as part of the costs.”.

[SEC. 402. Section 3405 is amended by striking out “or” after “title,” and striking out “him” and inserting in lieu thereof “such claimant or beneficiary, or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title, by word, circular, letter, or advertisement”.

[TITLE V—EFFECTIVE DATES

[SEC. 501. The provisions of this Act may become effective on the first day of the first month beginning 180 days after the date of enactment of this Act.

[SEC. 502. A civil action authorized in chapter 72 of title 38, United States Code, as added by section 302 of this Act, may be instituted to review decisions of the Board of Veterans' Appeals rendered on or after January 1, 1977, and prior to the effective date of this Act, but only if such actions are instituted not later than 180 days after the effective date of this Act or after the mailing of notice by the Administrator to the last known address of a claimant of the right to bring such a civil action, whichever occurs later.]

and insert in lieu thereof the following:

That (a) this Act may be cited as the “Veterans' Administration Adjudication Procedure and Judicial Review Act”.

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—ADJUDICATION PROCEDURES

SEC. 101. (a) Chapter 51 is amended by adding at the end of subchapter I the following new section:

“§ 3007. Burden of proof; benefit of the doubt

“(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence suffi-

cient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to his or her claim.

"(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration involving a claim for benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.".

(b)(1) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title are each amended by striking out in the item relating to chapter 51 "Applications" and inserting in lieu thereof "Claims".

(2) The heading of such chapter is amended to read as follows:

"CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS".

(c)(1) The table of sections at the beginning of such chapter is amended by striking out in the item relating to subchapter I "APPLICATIONS" and inserting in lieu thereof "CLAIMS".

(2) The heading of subchapter I of such chapter is amended to read as follows:

"Subchapter I—Claims".

(d) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 3006 the following new item:

"3007. Burden of proof; benefit of the doubt.".

SEC. 102. Section 3311 is amended by adding at the end the following new sentence: "Subpenas authorized under this section shall be served by any individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing by registered or certified mail addressed to such individual at such individual's last dwelling place or principal place of business. A verified return by the individual so serving the subpena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service.".

SEC. 103. Section 4001 is amended—

(1) by amending subsection (a)—

(A) by striking out "(not more than fifty)" and inserting in lieu thereof "(not more than sixty-five)";

(B) by striking out "associate"; and

(C) by inserting before the period at the end of the second sentence "in a timely manner"; and

(2) by adding at the end the following new subsection:

"(c) The Chairman shall submit a report to the appropriate committees of the Congress, not later than October 1, 1983, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, information specifying the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the twenty-four months preceding the prior fiscal year and the then current fiscal year, respectively, the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the prior fiscal year, and the number of members and other professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as provided for by subsection (a) of this section.".

SEC. 104. Section 4002 is amended by striking out "associate" wherever it appears.

SEC. 105. Subsections (a) and (b) of section 4003 are amended by inserting a comma and "after notice to the claimant of such additional information together with an opportunity to be heard in connection with such information," after "concerned" both places it appears.

SEC. 106. Section 4004 is amended—

(1) by amending subsection (a)—

(A) by striking out "involving" and inserting in lieu thereof "for"; and

(B) by inserting before the period at the end of the second sentence "after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law";

(2) by amending subsection (b) to read as follows:

"(b)(1) Except as provided in paragraph (2) of this subsection, when a claim is disallowed by the Board, it may not thereafter be reopened and allowed and no claim based upon the same factual basis shall be considered.

"(2) Following such a disallowance, the Board (directly or through the agency of original jurisdiction, as described in section 4005(b)(1) of this title)—

"(A) when new and material evidence is secured, shall, and

"(B) for good cause shown, may

authorize the reopening of a claim and review of the Board's former decision.

"(3) A judicial decision under subchapter II of chapter 71 of this title, upholding, in whole or in part, the disallowance of a claim shall not diminish the Board's authorities set forth in paragraph (2) of this subsection to authorize the reopening of a claim and review of the former decision."; and

(3) by amending subsection (d) to read as follows:

"(d) After reaching a decision in each case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

"(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact, law, and matters of discretion presented on the record; and

"(2) an order granting appropriate relief or denying relief.".

SEC. 107. Subsection (d)(5) of section 4005 is amended by striking out "will base its decision on the entire record and".

SEC. 108. Section 4009 is amended by adding after subsection (b) the following new subsection:

"(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and, after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. If the Board denies the request of such claimant for such an opinion, the Board shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for its determination. Actions of the Board under this subsection, including any such denial, shall be final and conclusive, and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, subchapter II of chapter 71 of this title to the contrary notwithstanding.".

SEC. 109. (a) Chapter 71 is further amended by adding at the end the following new sections:

"§ 4010. Adjudication procedures

"(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence.

"(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the considera-

tion of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator, under regulations which the Administrator shall prescribe, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

"(c)(1) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded opportunity—

"(A) at a reasonable time prior thereto as well as during such proceeding, to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

"(B) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations which the Administrator shall prescribe, pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

"(C) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

"(D) to submit rebuttal evidence;

"(E) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

"(F) to serve written interrogatories on any person, including any employee of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Administrator by the person to whom the interrogatories are directed or such person's representative.

"(2) The fee provided for in paragraph (1)(A) of this subsection may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(3) In the event of any objection filed under paragraph (1)(F) of this subsection, the Administrator shall, pursuant to regulations which the Administrator shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Administrator shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered.

"(4) If any person upon whom interrogatories are served under paragraph (1)(F) of this section fails to answer or fails to provide responsive answers to any such interrogatories within thirty days after service or such additional time as the Administrator may allow, the Administrator shall, upon a statement or showing by the party who served such interrogatories of general relevance and reasonable scope of the evidence sought, issue a subpena under section 3311 of this title (with enforcement of such subpena to be available under section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within one hundred miles of where such person resides, is employed, or transacts business.

"(d) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration may at any time disqualify himself or herself on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator shall determine the matter as a part of the record and decision in the case.

"(e) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board (1) shall constitute the exclusive record for decision in accordance with section 4004(a) of this title, (2) shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places, and (3) on the payment of a fee prescribed under section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time.

Such fee may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(f) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

"§ 4011. Notice of procedural rights

"In the case of any disallowance, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with disallowance after an initial review or determination, and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notice shall be on such forms as the Administrator shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration, (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, and (3) such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 4009 the following new items:

"4010. Adjudication procedures.
"4011. Notice of procedural rights.".

SEC. 110. (a) In order to evaluate the feasibility and desirability of alternative methods of (1) assuring the resolution of claims before the Administrator of Veterans' Affairs for benefits under laws administered by the Veterans' Administration as promptly and efficiently as feasible following the filing of a notice of disagreement pursuant to section 4005 (as amended by section 107 of this Act) or 4005A of title 38, United States Code, and (2) affording claimants the opportunity for a hearing before or review by a disinterested authority at a location as convenient and on as timely basis as possible for each claimant, the Administrator is authorized to conduct a study, commencing not more than one year after the date of the enactment of this Act, for a period of twenty-four months, involving either or both of the alternative methods described in subsection (b) of this section for resolution of claims.

(b)(1) In not more than three geographic areas, the Administrator is authorized to provide an intermediate-level adjudication process whereby each claimant may, within the time afforded such claimant under paragraph (3) of such section 4005(d) or 4005A(b) to file an appeal, request a de novo hearing at the agency of original jurisdiction (as described in section 4005(b)(1) of such title 38) before a panel of three Veterans' Administration employees, each of whose primary responsibilities include adjudicative functions but none of whom shall have previously considered the merits of the claim at issue. Following such hearing, such panel shall render a decision and prepare a new statement of the case in accordance with the requirements of paragraphs (1) and (2) of such section 4005(d). Such new statement of the case shall, for all purposes relating to appeals under chapter 71 of such title 38, be considered to be a statement of the case as required by paragraph (1) of such section 4005(d).

(2) In not more than three other geographic areas, the Administrator is authorized to provide for an enhanced schedule of visits, on at least a quarterly basis each year, by a panel or panels of the Board of Veterans' Appeals to conduct formal recorded hearings pursuant to such section 4002 in such areas.

(c) Not later than six months after the completion of such study, the Administrator shall report to the Congress on the results thereof, including an evalu-

ation of the cost factors associated with each alternative studied and with any appropriate further implementation thereof, the impact on the workload of each regional office involved in such study, and the impact on the annual caseload of the Board of Veterans' Appeals resulting from each alternative studied, together with any recommendations for administrative or legislative action, or both, as may be indicated by such results.

TITLE II—VETERANS' ADMINISTRATION RULE MAKING

SEC. 201. (a) Subchapter II of chapter 3 is amended by adding at the end the following new section:

"§ 221. Rule making

"Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator shall be subject to the requirements of section 553 of title 5.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 220 the following new item:

"221. Rule making.".

TITLE III—JUDICIAL REVIEW

SEC. 301. Section 211(a) is amended by striking out "sections 775, 784" and inserting in lieu thereof "sections 775 and 784 and subchapter II of chapter 71 of this title".

SEC. 302. (a) Chapter 71 is further amended by adding at the end the following new subchapter:

"Subchapter II—Judicial Review

"§ 4025. Right of review; commencement of action

"(a) For the purposes of this chapter and section 3404 of this title—

"(1) 'final decision of the Administrator' means—

"(A) a final determination of the Board of Veterans' Appeals pursuant to section 4004 (a) or (b) of this title; or

"(B) a dismissal of an appeal by the Board of Veterans' Appeals pursuant to section 4005 or 4008 of this title; and

"(2) 'claim for benefits' means—

"(A) an initial claim filed under section 3001 of this title;

"(B) a challenge to a decision of the Administrator reducing, suspending or terminating benefits; or

"(C) any request by or on behalf of the claimant for reopening, reconsideration, or further consideration in a matter described in clause (A) or (B) of this paragraph.

"(b) Except as provided in subsection (f) of this section, after any final decision of the Administrator adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within 180 days after the mailing to the claimant of notice of such decision pursuant to section 4004 of this title. Such action shall be brought against the Administrator in the district court of the United States for the judicial district in which the plaintiff resides or the plaintiff's principal place of business is located, or in the district court of the United States for the judicial district where the principal offices of the Board of Veterans' Appeals (established under section 4001 of this title) are located.

"(c) The complaint initiating an action under subsection (a) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's records in the custody or control of the Veterans' Administration.

"(d) The Administrator shall file, together with the answer to a complaint filed pursuant to subsection (a) of this section, a certified copy of the records upon which the decision complained of is based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the

Administrator to file certified copies of such indexed items as the court deems relevant to its consideration of the case.

"(e) In an action brought pursuant to subsection (b) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (d) of this section, to enter judgment in accordance with section 4026 of this title or remand the cause in accordance with section 4026 or 4027 of this title.

"(f) No action may be brought under this section—

"(1) where the initial claim for benefits is filed pursuant to section 3001 of this title after the last day of the fifth fiscal year beginning after the effective date of this section; or

"(2) with respect to matters arising under chapters 19 and 37 of this title.

"§ 4026. Scope of review

"(a) In any action brought under section 4025 of this title, the court to the extent necessary to its decision and when presented, shall—

"(1) decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

"(2) compel action of the Administrator unlawfully withheld;

"(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), and conclusions of the Administrator found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(D) without observance of procedure required by law; and

"(4) in the case of a finding of material fact made in reaching a decision on a claim for benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside. Before setting aside under this clause any finding of fact, the court shall specify the deficiencies in the record upon which the court would set aside such finding, and shall remand the case one time to the Administrator for further action not inconsistent with the order of the court in remanding the case. In so remanding a case, the court shall specify a reasonable period of time within which the Administration shall complete the ordered action. If the Administrator does not complete action on the case within the specified period of time, the case shall be returned to the court for its further action.

"(b) In making the determinations under subsection (a) of this section, the whole record before the court pursuant to section 4025(d) of this title shall be subject to review, and the court shall review those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In no event shall findings of fact made by the Administrator be subject to trial de novo by the court.

"(d) When a final decision of the Administrator is adverse to a party and the sole stated basis for such decision is the failure of such party to comply with any applicable regulation of the Veterans' Administration, the court shall review only questions raised as to compliance with and the validity of the regulation.

"§ 4027. Remands

"(a)(1) In any action brought under section 4025 of this title, the court shall, on motion of the Administrator made before the expiration of the time specified for the filing of an answer to a complaint filed pursuant to subsection (b) of such section, allow a single remand of a case to the Administrator for further review by the Administrator. If such review is not completed within ninety days after the date of such remand, the matter shall be returned to the court for its action.

"(2)(A) At any time after the Administrator files an answer, the court may, in the exercise of its discretion, remand the case to the Administrator for further action by the Administrator.

"(B) If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Administrator and order such additional evidence to be taken by the Administrator.

"(C) In the case of a remand under subparagraph (A) or (B) of this paragraph, the court may specify a reasonable period of time within which the Administrator shall complete the required action.

"(b) After a case is remanded to the Administrator under subsection (a) of this section, and after further action by the Administrator, including consideration of any additional evidence, the Administrator shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of the findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, affirmation, or reversal was based. Any such modification, supplementation, affirmation, or reversal of the findings of fact or decision shall be reviewable by the court only to the extent provided in section 4026 of this title.

"§ 4028. Survival of actions

"Any action brought under section 4025 of this title shall survive, notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office.

"§ 4029. Appellate review

"The decisions of a district court pursuant to this chapter shall be subject to appellate review by the courts of appeals and the Supreme Court of the United States in the same manner as judgments in other civil actions.".

(b) The table of sections at the beginning of such chapter is amended—

(1) by inserting before the item relating to section 4001 the following new item:

"SUBCHAPTER I—GENERAL";

and

(2) by adding after the item (added by section 109(b) of this Act) relating to section 4011 the following new items:

"SUBCHAPTER II—JUDICIAL REVIEW

"Sec.
"4025. Right of review; commencement of action
"4026. Scope of review.
"4027. Remands.
"4028. Survival of actions.
"4029. Appellate review.".

SEC. 303. Section 1346(d) of title 28, United States Code, is amended by inserting before the period at the end thereof "except as provided for in subchapter II of chapter 71 of title 38".

TITLE IV—ATTORNEYS' FEES

SEC. 401. Section 3404 is amended—

(1) by amending subsection (c) to read as follows:

"(c) The Administrator shall approve reasonable attorneys' fees to be paid by the claimant, to attorneys recognized under this section, for representation before the Veterans' Administration in connection with a claim for benefits under laws administered by the Veterans' Administration, but in no event shall such attorneys' fees exceed—

"(1) for any claim resolved prior to or at the time that a final decision of the Administrator is first rendered, $10; or

"(2) for any claim resolved after such time, an amount in excess of—

"(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 per centum of the total amount of any past-due benefits awarded on the basis of the claim; or

"(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

"(i) the fee agreed upon by the claimant and the attorney; or

"(ii) $500, or such greater amount as may be specified from time to time in regulations which the Administrator shall prescribe based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Administrator may, in the Administrator's discretion, determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee."; and

(2) by adding at the end of such section the following new subsections:

"(d)(1) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant. When the claimant and an attorney have entered into an agreement under which the amount of the fee payable to such attorney is to be paid from any past-due benefits awarded on the basis of the claim and the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant, the fee so determined and allowed shall not exceed 25 per centum of the total amount of any past-due benefits awarded on the basis of the claim.

"(2) If, in an action brought under section 4025 of this title, the matter is not resolved in a manner favorable to the claimant, the court, taking into consideration the likelihood at the time such action was filed that the claimant would prevail, may determine and allow a reasonable fee not in excess of $750 to be paid to the attorney by the claimant for the representation of such claimant.

"(e) To the extent that past-due benefits are awarded in proceedings before the Administrator or a court, the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the decision of the Administrator or court making such award.

"(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.

"(g) For the purposes of subsections (c) and (d) of this section, claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

"(h) In an action brought under section 4025 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs where the court finds that the position of the Administrator was not substantially justified or that special circumstances make an award just.".

SEC. 402. Section 3405 is amended—

(1) by striking out "or" after "title,"; and

(2) by striking out "him" and inserting in lieu thereof "such claimant or beneficiary, or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title".

TITLE V—MERIT PAY SYSTEM EXCLUSION FOR BOARD OF VETERANS' APPEALS MEMBERS

SEC. 501. Section 4001(b) is amended by adding at the end the following new sentence: "The provisions of section 5402 of title 5 shall not be applied to any member of the Board.".

TITLE VI—EFFECTIVE DATES

SEC. 601. The provisions of this Act shall become effective on the first day of the first month beginning 180 days after the date of the enactment of this Act.

SEC. 602. A civil action authorized in subchapter II of chapter 71 of title 38, United States Code (as added by section 302(a) of this Act) may be instituted to review decisions of the Board of Veterans' Appeals rendered on or after April 1, 1982.

Introduction

S. 349, the proposed "Veterans' Administration Adjudication Procedure and Judicial Review Act", was introduced on January 30, 1981, by Senator Gary Hart of Colorado, Senator Alan Cranston, Ranking Minority Member of the Committee on Veterans' Affairs, and Senator Dennis DeConcini.

The introduction of S. 349 was one in a series of steps dating back to the 94th Congress, when Senator Hart indicated his intention to offer as an amendment to the then-pending GI Bill amendments judicial review legislation that he had introduced as S. 3392. The then-Chairman of the Committee, Senator Vance Hartke, asked that Senator Hart refrain from proposing the amendment and, instead, introduce the legislation in the 95th Congress. Senator Hart agreed to this step on the basis of a promise that the Committee would hold comprehensive hearings on the issues raised by the proposal. Thus, Senator Hart reintroduced judicial review legislation in the 95th Congress as S. 364, and the Committee held 5 days of hearings—three in field locations and two in Washington, D.C. Based on the testimony received at those hearings, a decision was made to postpone Committee consideration of S. 364 and to draft a substitute measure more closely tailored to existing VA procedures and to the interests of veterans and veterans' survivors with claims before the agency. The drafting of this substitute legislation was finally completed in December 1978, and S. 349 was introduced in the 96th Congress. This bill was reported out of the Committee, with an amendment in the nature of a substitute, on May 3rd, 1979, by a vote of 9–1, and passed the Senate by a voice vote on September 17, 1979.

S. 349 as introduced was identical to the Senate-passed version of S. 330. The Committee held a hearing to consider S. 349 and related issues on July 15, 1981. Testimony was received from Robert E. Coy, Acting General Counsel of the VA; the Chairman and two chief members of the Board of Veterans' Appeals; Frederick Davis, Vice Chairman of the American Bar Association's Special Committee on Veterans, and Dean of the University of Dayton School of Law; as well as representatives of The American Legion, Veterans of Foreign Wars, AMVETS, Paralyzed Veterans of America, and the National Veterans' Law Center. Written testimony was received from Senator Gary Hart and from the Disabled American Veterans.

After reviewing the testimony received during the hearings and the VA's report on this legislation, and giving consideration to various recommendations made by VA staff in discussions with staff of the Committee, the Committee met in open session on April 28, 1982, to consider S, 349 and voted to report favorably S. 349 with an amendment in the nature of a committee substitute.

Summary of S. 349 as Reported

Basic Purpose

The basic purpose of S. 349 as reported (hereinafter referred to as "the Committee bill") is to assure that veterans and other claimants before the VA receive all benefits to which they are entitled. The Com-

mittee bill is designed to serve that purpose providing such claimants with an opportunity for judicial review of final decisions of the Administrator of Veterans' Affairs denying claims for benefits, by codifying certain internal procedures of the VA relating to the adjudication of benefit claims, by requiring that VA rulemaking processes comply with provisions of the Administrative Procedure Act relating to notice and comment, and by providing for attorneys to receive reasonable fees for representing claimants before the VA following a final denial of the claim by the Board of Veterans' Appeals (BVA) and representing claimants in judicial proceedings.

Summary of Provisions

The Committee bill has six titles: Adjudication procedures; Veterans' Administration rule making; Judicial review; Attorneys' fees; Merit pay system exclusion for Board of Veterans' Appeals members; and Effective dates, as follows:

Title I: *Adjudication procedures.*—This title would codify and establish various internal procedures of the VA applicable in adjudications of claims for benefits under laws administered by the VA. Included in title I of the Committee bill are provisions that would:

1. Codify the burden of proof and reasonable doubt standards in VA claims adjudication proceedings, currently provided for by regulation (38 CFR 3.102 and 3.103), in order to assure that the VA's present practices of providing claimants all reasonable assistance in the development of claims and construing the evidence liberally in favor of the claimant are not lost in reaction to the provision, in title III of the Committee bill, authorizing judicial review of final decisions denying claims.

2. Specify procedures for the service of subpenas authorized under section 3311 of title 38, United States Code, including procedures for personal service or service by mail.

3. Increase the statutory limitation on the size of the BVA from 50 to 65 in order both to ease existing strains on the BVA's docket and to enhance the Board's ability to deal with workload increases that may be generated by judicial review of VA decisions.

4. Encourage the BVA to dispose of appeals before it in a timely manner.

5. Require the Chairman to report to the appropriate committees of the Congress annually on the Board's current and future workload and its ability, based on then current and projected staffing, to dispose of appeals in a timely manner.

6. Require the BVA to provide a claimant with notice and an opportunity for a hearing before making a decision based on additional official information received after the BVA had previously decided the case.

7. Codify a claimant's right to an opportunity for a hearing before the BVA.

8. Require expressly that BVA decisions must be based exclusively on evidence and material of record and on applicable provisions of law.

9. Make a technical correction in the description of the BVA's authority to reopen a claim by deleting (as inconsistent with pres-

ent practice) the present requirement that new and material evidence sufficient to reopen a claim be in the form of official reports from the proper service department.

10. Specify that a court decision upholding denial of a claim under title III of the Committee bill, shall not diminish the Board's discretionary authority to reopen a claim.

11. Require the BVA to mail a detailed statement of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and such representative.

12. Expand the present requirement that BVA decisions be in writing and contain findings of fact and conclusions of law separately stated, to require that such decisions include findings and conclusions and reasons and bases therefor, on all material issues of fact, law, and matters of discretion, as well as an order granting or denying relief.

13. Expressly provide a claimant before the BVA with the right, upon request, to have the Board acquire an independent medical opinion when there is a substantial disagreement between the substantiated findings or opinions of two physicians on an issue material to the outcome of the case. Any Board decision to deny such a request, and the basis for such denial, would have to be provided to the claimant but such decision would not be subject to judicial review.

14. Authorize the Administrator to administer oaths and affirmations, examine witnesses and receive evidence in VA claims adjudication proceedings.

15. Provide for the admission, even if inadmissible under the rules of evidence applicable in court, of all evidence submitted in VA claims adjudication proceedings subject only to such provisions as the Administrator may impose through regulations for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

16. Provide that, in the course of hearings on a claim for VA benefits following initial denial of the claim, the claimant (or other party) shall have the right to review and, on the payment of a fee (waivable, pursuant to regulations that the Administrator must prescribe, on the basis of inability to pay or for other good cause shown) limited to the costs of duplication, to obtain copies of the case files and all materials to be used by the VA at the hearing, to present witnesses and evidence including medical opinions and rebuttal evidence, to make argument and to submit written contentions, and to submit to any person written interrogatories which must be answered unless written objections thereto are filed. If the person served with interrogatories files an objection thereto, the Administrator must, pursuant to regulations that the Administrator must prescribe, evaluate the objection and issue an order directing that answers be given or stating that they need not be given. If the person served with interrogatories fails to comply with such an order or, in the absence of an objection, to answer the interrogatories, the party who served the interrogatories would have the right, upon a statement or showing of good cause,

to have the Administrator issue a subpena (enforceable in Federal district court) for the witness' attendance at a deposition at which the unanswered interrogatories would be asked.

17. Allow, in the course of any claims proceeding, any VA employee to disqualify himself or herself on the basis of personal bias or other cause and a party to challenge such an employee on such basis.

18. Specify the materials that must be included in the record of VA claims adjudication proceedings and provide that the record shall be available for the claimant's inspection and shall be copied for the claimant upon the payment of a fee (waivable, pursuant to regulations that the Administrator must prescribe, on the basis of claimant's inability to pay or for other good cause shown) limited to the costs of duplication.

19. Specify that the adjudication rights contained in title 38 and prescribed thereunder by the Administrator are exclusive.

20. Require the Administrator, at each stage of claims adjudication proceedings before the VA, to provide the claimant with detailed notice, in easily understandable language, of the claimant's procedural rights.

21. Authorize a VA study of alternative methods of ensuring the prompt and efficient resolution of claims and affording claimants the opportunity for a timely and convenient hearing or review by a disinterested authority. Under this provision, the Administrator could study the following two alternative methods of speeding claims resolution at locations convenient to claimants: (A) intermediate review panels which would conduct *de novo* reviews at VA regional offices prior to appeal to the BVA, and (B) an enhanced schedule of BVA traveling board visits (at least four per year). The report on the study, including the Administrator's recommendations for administrative or legislative actions, or both, would be due to be submitted to the Congress within 6 months after completion of the study.

Title II: *Veterans' Administration rule making.*—This title would require application of the Administrative Procedure Act (APA) provisions applicable to rule making, including requirements of notice to the public of proposed regulations and opportunity for comment on such proposed regulations, notwithstanding the exclusion from such provisions in section 553(a)(2) of title 5, United States Code, of matters involving loans, grants, benefits, or contracts.

Title III: *Judicial review.*—This title would permit access to the United States Federal court system for review of decisions of the Administrator on claims for benefits. Included in title III of the Committee bill are provisions that would:

1. Expand the present category of exceptions to the general preclusion of judicial review contained in present section 211(a) of title 38, United States Code.

2. Authorize review of a final decision of the Administrator adverse to a VA benefits claimant in Federal district court (in either the plaintiff's home district or the judicial district where the Board of Veterans' Appeals is located, presently the District of Columbia) instituted by a civil action brought within 180 days of the mailing by the VA of notice of such decision.

3. Define a "final decision of the Administration", which may be appealed to Federal court, to include a Board of Veterans' Appeals (BVA) final decision on the merits, refused to reopen a claim, and dismissal of an appeal.

4. Define "claim for benefits" to include not just initial claims, but also subsequent action taken on a claim such as reduction or termination of benefits.

5. Require that a complaint instituting a civil action for court review of a decision relating to a claim for benefits include sufficient information to permit the VA to identify and locate the plaintiff's VA records.

6. Require the VA to file, together with its answer to a complaint, a certified copy of all of the materials that constitute the record or, if the cost of filing all such materials would be unduly expensive, a complete index of all of the materials. In the latter case, the court would, after considering the requests of the parties, order the Administrator to file certified copies of such indexed items as it deemed relevant to its consideration of the case.

7. Authorize a court, in an action for review of a VA denial of a claim for benefits, to enter a judgment on the pleadings and the records.

8. Preclude judicial review, under the provisions added by this title of the Committee bill, which the initial claim is filed with the Administrator on or after the last day of the fifth fiscal year beginning after the effective date of such provisions, and with respect to matters arising under chapters 19 (insurance) and 37 (home, condominium, and mobile home loans) of title 38, United States Code.

9. Authorize the reviewing court to decide all relevant questions of law; to interpret constitutional, and statutory provisions as well as other actions of the Administrator, compel action of the Administrator unlawfully withheld; and to hold unlawful and set aside decisions, findings, and conclusions of the Administrator found to be (A) arbitrary, capricious, an abuse of discretion, or not in accordance with law, (B) contrary to constitutional right, power, privilege, or immunity, (C) in excess of statutory, jurisdiction, authority, or limitation, or in violation of a statutory right, or (D) without observance of procedure required by law, or (E) in the case of a finding of material fact, so utterly lacking in a rational evidentiary basis that a manifest and grievous injustice would result if the finding were not set aside.

10. Require a reviewing court, before reversing an Administrator's decision on the basis of the court's finding that a factual determination of the Administrator is utterly lacking in a rational evidentiary basis, to specify where it finds the record deficient and remand the matter a single time to the Administrator for further action within a reasonable, specified period of time.

11. Require a court, in making determinations, to review those parts of the administrative record cited by a party and to take due account of the rule of prejudicial error.

12. Preclude a reviewing court from conducting a trial *de novo* on the Administrator's findings of fact.

13. Provide that, in a matter resolved by the VA solely on the basis of a party's failure to comply with a VA regulation, the reviewing court may consider only issues raised as to the validity of or a party's compliance with the regulation.

14. Authorize three different types of remands from the reviewing court to the Administrator: First, a single remand for not more than 90 days, at the Administrator's request before the Administrator files an answer, for the Administrator to reconsider the case; second, a remand in the court's discretion after the Administrator has filed an answer; and third, a remand if either party applies for leave to adduce further evidence and the moving party shows "good cause" for the requested remand.

15. Provide that any actions brought under the judicial review provisions added by this title of the Committee bill will survive the tenure of any individual as Administrator.

16. Provide that decisions of the district court pursuant to the judicial review provisions added by this title shall be subject to review in higher Federal courts in the same manner as judgments in other civil actions.

17. Specify that the current-law limitation on the jurisdiction of Federal district courts in matters involving pensions shall not apply to VA pension matters.

Title IV: *Attorneys' fees.*—This title would revise the present title 38 limitation of $10 for claimants' attorneys' fees by authorizing reasonable attorneys' fees, within certain limits, for representation of individuals before the VA and for representation in a case appealed to court under the judicial review provisions added to title 38 by this title of the Committee bill, with a specified limitation in cases in which the matter is resolved in a manner unfavorable to the claimant. Included in title IV are provisions that would:

1. Retain the $10 limitation on the amount an attorney may receive for services rendered prior to a final BVA decision.

2. Permit the Administrator to approve a reasonable attorneys' fee for representation within the VA after a final BVA decision (where, for example, a case remains before the VA for reconsideration or for reopening on the basis of "new and material evidence" offered under section 4004(b) of title 38, United States Code, as amended by title I of the Committee bill), up to a maximum of $500 or, if the claimant and attorney have entered into a contingency-fee agreement, no more than 25 percent of any past-due benefits awarded the claimant.

3. Authorize the Administrator to increase the $500 maximum limitation in future years to reflect changed economic conditions.

4. Authorize the Administrator to disregard the $500 limitation in an individual case involving extraordinary circumstances warranting a higher fee.

5. Allow a reviewing court, in a case appealed from the VA, to approve a reasonable attorneys' fee. For cases not resolved in a manner favorable to a claimant, the maximum a court could approve would be $750. For cases resolved in a manner favorable to a claimant, the only limitation on the amount of the fee that a court could approve would be that it must be reasonable, or that,

if a claimant and an attorney had entered into a contingent-fee agreement, the fee approved by the court could not exceed 25 percent of the total amount of past-due benefits.

6. Authorize the VA to make payment to an attorney from past-due benefits, but preclude the VA from making payments from benefits received subsequent to the date of the decision entitling the veteran to benefits.

7. Limit the applicability of the attorneys' fee provisions to cases involving claims of benefits.

8. Define, for the purpose of attorneys' fees provisions, a claim as being "resolved in a manner favorable to the claimant" when any or all of the relief sought is granted.

9. Authorize a court to award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs where the court finds that the position of the Administrator was not substantially justified or that special circumstances make an award unjust.

10. Provide criminal penalties for willfully and intentionally defrauding a VA claimant.

Title V: *Merit pay system exclusion for Board of Veterans' Appeals members.*—This title would exempt members of the BVA other than the Chairman and the Vice Chairman from the merit pay provisions of the Civil Service Reform Act of 1978.

Title VI: *Effective dates.*—This title provides for an effective date and authorizes the institution of civil actions, under the judicial review provisions added by title III of the Committee bill, for the review of certain Board of Veterans' Appeals (BVA) decisions prior to such effective date. Included in this title are provisions that would:

1. Provide that the provisions added by the Committee bill would become effective 180 days after the date of enactment.

2. Allow for court review of a BVA decision rendered on or after April 1, 1982.

Discussion

As was discussed earlier, the Committee's involvement with the issue of judicial review of Veterans' Administration decision began in the 94th Congress and has progressed through four different bills, eight hearings, extensive consultations with a variety of interested parties, and significant technical assistance from the VA. Thus, the present legislation is an attempt to reconcile a wide variety of viewpoints on the issue of judicial review of VA decisions and the related issues of internal adjudication procedures, attorneys' fees, and VA rulemaking procedures.

The Committee bill is not based on a belief that the current preclusion of judicial review of BVA decisions results in wide-spread injustices; to the contrary, there is no evidence that most claimants are not satisfied with the resolution of their claims for VA benefits. Rather, this legislation reflects the Committee's view that the primary original rationale behind the statutory preclusion of judicial review is now obsolete. The preclusion first appeared in the Economy Act of 1933, Public Law 73–2, and reflected the view that veterans' benefits are mere gratuities and that veterans have no interest in or right to such benefits

so compelling as to warrant the protection afforded by access to court review. The Committee feels that such a position is no longer tenable, particularly in light of the protection, including access to court, that have been extended in recent years to recipients of most other Federal benefits.

In addition, the tremendous volume of applications for benefits that are processed annually by the VA and the many thousands of appeals taken from unfavorable decisions—a record 68,183 in fiscal year 1981—suggests that there is a significant opportunity for some injustices to occur. Under current law, a veteran or other claimant aggrieved by a final VA decision is left without any further recourse.

Beyond the possibility of real injustices without remedy, the Committee has also continued its consideration of judicial review legislation in order to address what some veterans, especially those whose claims for benefits are denied by the VA, perceive as a system with various unjust features. The combination of no judicial review and a statutory limit of $10 on the amount an attorney is permitted to receive for representing an individual before the VA on a claim for benefits, which effectively precludes all but *pro bono* attorney representation of veterans or other claimants in VA claims matters, has led many claimants over the years to believe that they have been denied their "day in court".

This legislation is designed to ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives from the VA every benefit and service to which he or she may be entitled under law. There is also an emphasis on eliminating any unwarranted distinctions that exist between protections accorded to veterans and claimants for Federal benefits from other agencies. At the same time, the Committee recognizes that certain of these distinctions have considerable merit, and should be preserved. Many of the VA's internal procedures, particularly in the area of adjudication of claims, have developed over the years in such a way as to afford to VA claimants some advantages not afforded to claimants before other agencies. Advantages most often cited are the VA's very liberal standards for the admission of evidence, and free representation before the VA by skilled officers of the various national veterans' service organizations—advantages which are often credited for the informal, "nonadversarial" nature of VA proceedings.

Throughout its consideration of this legislation, the Committee has been keenly aware of these important factors, and has sought to incorporate them into the legislation. During recent consideration of S. 349, however, the Committee has given renewed attention and the utmost deference to these unique and desirable VA practices. The Committee amendment to S. 349 reflects a renewed effort to retain such practices and to enhance them by the addition of new rights and protections for claimants before the VA. It frames the judicial review and attorneys' fees provisions restrictively in order to reflect the Committee's abiding respect both for the high quality of representation offered by the veterans' service organizations and for the BVA's expertise as an arbiter of factual issues, as well as to minimize the burden that this legislation will impose on the Federal court system.

TITLE I: ADJUDICATION PROCEDURE

Title I of the Committee bill contains a number of provisions related to the proposed provision for judicial review of VA decisions under title III of the Committee bill.

Throughout Committee consideration of judicial review legislation, several witnesses expressed concern over the possible detrimental impact that the allowance of court review could have on internal VA claims procedures. Those who voiced this concern noted that, because of the VA's special mission of providing services to veterans and their survivors, the VA has developed regulations and procedures that result in a very supportive, nonadversarial, and informal atmosphere that is generally quite beneficial to veterans. In addition, it has been noted that, because the Board of Veterans' Appeals is the final arbiter of veterans ' claims, it proceeds with particular care and concern in its evaluation of such claims.

Other witnesses and commentators, although not disagreeing with the viewpoint that the VA's present internal procedures are generally beneficial to veterans, expressed concern that because many of the VA's regulations and procedures relating to the adjudication of claims have no clear statutory basis, and because court review of administrative actions is precluded, claimants' rights may depend on the whim of particular individuals in the adjudications process. In addition, it was suggested by some witnesses that it was not clear that current VA procedures lead to the development of a sufficient administrative record to provide a reviewing court, in the event of judicial review, with an adequate basis on which to evaluate the VA's decision.

In response to these various concerns, the Committee bill contains provisions relating to VA adjudication procedures that fall into three broad categories—provisions codifying certain VA adjudications procedures (some set forth in regulations and some only a matter of practice) so as to assume claimants certain procedural protections while preserving the informality that characterizes VA procedures at present; provisions intended to promote the development of an administrative record that should enable a reviewing court to understand and evaluate the VA's proceedings in a given case; and provisions intended to enhance the VA's ability to carry out its mission of service to veterans and their dependents and survivors after judicial review has been authorized.

All of the veterans groups that presented views to the Committee on S. 349, including The American Legion, the Veterans of Foreign Wars, the Disabled American Veterans, AMVETS and the Paralyzed Veterans of America, expressed their general support for the various provisions of title I. The VA, in its testimony, indicated general opposition to the provisions of title I, primarily on the basis of the relationship of title I to titles III (Judicial Review) and IV (Attorneys' Fees), both of which the VA opposed.

Codification of VA Adjudications Procedures

In the category of provisions codifying present VA adjudications procedures, section 101(a) of the Committee bill includes a provision codifying the burden of proof and reasonable doubt standards cur-

rently provided for by VA regulation (38 CFR 3.102 and 3.103(a)). The reason for proposing such codification is to ensure that the VA's present practice of making every effort to award a benefit to a claimant is not abandoned. Many witnesses suggested in the course of hearings on S. 349 and its predecessor bills that this might occur, in response to court review, especially if the agency believed that a reviewing court might apply the benefit-of-the-doubt standard, simply substituting its judgment on factual issues for that of the Administrator in cases where evidence clearly failed to establish entitlement. The Committee does not believe that such a result is likely, particularly in light of the restricted scope of judicial review that is proposed with respect to factual VA determinations under title III of the Committee bill, and believes strongly that the existing regulatory standards relating to a claimant's burden and the VA's evaluation of the claim should be maintained.

Under the provision included in the Committee bill, as in current VA regulations, a claimant for benefits has the burden of submitting evidence sufficient to justify a belief that a "claim is well grounded," and the VA has the burden to assist the claimant in developing the facts pertinent to the claim. Thus, the claimant would have the burden of adducing some evidence on each element necessary to warrant the granting of the benefit at issue. In determining whether this form of a "prima facie" showing requirement has been met, only the evidence favorable to the claimant should be considered; of course, in making the ultimate determination of entitlement to the benefit in question, all of the evidence of record should be considered. Issues regarding the weighing of conflicting and other adverse evidence are to be resolved under the provisions regarding the benefit of the doubt.

In that regard, the Committee bill clarifies and codifies the "reasonable doubt" standard, which, under VA regulation, is stated, in equivocal and sometimes internally inconsistent terms, as follows:

§ 3.102 Reasonable doubt.

It is the defined and consistently applied policy of the Veterans' Administration to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists by reason of the fact that the evidence does not satisfactorily prove or disprove the claim, yet a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not a justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the

basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships. In the Committee's view, the various parts of the VA's present "reasonable doubt" rule are difficult to follow—for example, the statement that the rule is not to be used to reconcile actual conflict or contradiction in the evidence.

In addition, the VA and others have urged that the term "reasonable doubt" be deleted from any statutory codification of the rule in order to avoid confusion with the more familiar usage of that term in criminal matters.

After extensive consultations with the VA with respect to the current VA interpretation of the rule and practices under it, the Committee bill provision has been fashioned to require that where the totality of the evidence is such that "there is an approximate balance of positive and negative evidence regarding the merits" of a material issue, the doubt is to be resolved in the claimant's favor. Thus, under the provision in the Committee bill, where on the basis of all the relevant evidence an element of a claim is neither clearly established nor clearly refuted, the benefit of the doubt is to be given to the claimant. Where the evidence clearly calls for a finding of fact for or against the claimant, such a rule would be unnecessary and would thus not apply; the finding would simply follow the clear direction of the evidence.

The amendment to the Committee bill further codifies the VA's obligation, currently imposed by regulation (38 CFR 3.103), to provide complete assistance to the veteran or other claimant in the development of the claim. Although the claimant has the burden of submitting evidence in support of the claim, that evidence may be in the veteran's service record or other governmental records and, therefore, in the control of the Federal Government. In such situations, the VA should be responsible for providing the material—or seeing that it is provided—needed to make the determination on eligibility.

The Committee bill, at section 106(1), also would codify a right currently provided by regulation (38 CFR 19.133) to an opportunity for a hearing before the Board of Veterans' Appenls. In the Committee's view, the right to a hearing is so fundamental to fair proceedings that it should be elevated to the level of a statutory guarantee.

Section 106(1) of the Committee bill also would codify a requirement that BVA decisions be based "exclusively on evidence and material of record" and on applicable provisions of law. This requirement is consistent with BVA practice. In fact, a provision in current law (section 4005(d)(5) of title 38) requires that the BVA base its decision "on the entire record", but there is no express requirement that decisions be based *exclusively* on the record. Section 107 of the Committee bill would strike that provision as unnecessary in light of proposed exclusivity requirement in section 106. The purpose of these provisions is to clarify that the BVA is restricted to material of record and is not free to review other evidence in reaching its decision. It is proposed to relocate the provision so as to place it under the section (4004 of title 38) that generally deals with BVA decisionmaking.

Section 106(2) of the Committee bill would amend the section of current law that relates to the Board's authority to authorize the reopening of a previously disallowed claim, section 4004(b) of title

38, to remove a requirement that the "new and material evidence" sufficient to authorize a reopening be in the form of "official reports from the proper service department". Current Board practice is to authorize such a reopening when "new and material evidence" is received from any source. This provision would further amend section 4004(b) so as to make a reopening by the Board mandatory rather than discretionary when new and material evidence is presented, and to authorize a reopening on a discretionary basis upon a showing of good cause. By these changes, the Committee intends to create a more certain basis for the reopening of claims that have been considered and disallowed by the Board. Moreover, under these changes—in connection with the attorneys' fees amendments that would be made by section 401(1) of the Committee bill (pursuant to which a claimant before the VA could pay an attorney more than the current $10 limit for services rendered after an initial decision by the Board)—an attorney entering a case following a disallowance by the Board would not always be restricted, in appealing to court, to relying on the administrative record in existence when the attorney entered the case. Rather, by virtue of these proposed changes, an attorney would have an opportunity to attempt to ensure that the administrative decision is made on the basis of all appropriate evidence and arguments, by seeking either a mandatory reopening for new and material evidence or a discretionary reopening for good cause shown. In this regard, the Committee believes that good cause sufficient to justify a reopening might be shown by a demonstration that the earlier presentation of the claim before the BVA had failed to develop particular evidence in the record, or had inadequately presented important issues or elements of the claim, or was otherwise deficient in some material (that is, potentially outcome determinative) respect. Upon such a showing, the Board would have the option of reopening the case in order to consider new or modified arguments rather than leaving court review as the only recourse.

The Committee recognizes that, under current practice, the Board routinely refers claims that are being considered for reopening to the regional office that adjudicated the claim in the first instance (described as the "agency of original jurisdiction" in present section 4005 (b) of title 38). The Committee does not intend to restrict the Board's discretion in this regard by establishing a mandatory reopening requirement or adding a discretionary reopening authority. Thus, the provision added by section 106(2) of the Committee bill makes reference to the Board's taking action in these respects either "directly or through the agency of original jurisdiction". When either a mandatory or discretionary reopening issue is presented, the Board would be able either to take action itself—that is, decide whether to reopen the claim or, after a decision to authorize a reopening, to review the prior decision, or both—or refer the claim to the regional office for such a decision on either question or both.

The final provision in section 106(2) of the Committee bill provides that a judicial affirmation of a denial of a claim by the BVA "shall not diminish the Board's authorities set forth in paragraph (2) of this subsection to authorize the reopening of a claim and review of the former decision." The purpose of this provision is to preclude any *res*

judicata effect of such a judicial decision on any case that is reopened at the agency level for either of the reasons specified in paragraph (2), that is, when new and material evidence is secured (in which case reopening would be mandatory), or when good cause is shown (in which case reopening would be discretionary).

Section 106(3) of the Committee bill would require that the BVA promptly mail notice of its decision to a claimant and the claimant's authorized representative—thus codifying an existing practice of the BVA—in order to serve two purposes: First, such notice of the decision would indicate to a claimant that the BVA has taken final action on the claim and would thus enable the claimant to consider the possibility of seeking court review of an unfavorable decision; and second, the date on which the BVA complies with this statutory obligation by mailing the notice will be the date from which the 180-day period for filing an appeal (as set forth in new section 4025 of title 38, as proposed to be added by section 302 of the Committee bill) would begin to run.

A final set of provisions intended to codify VA procedural protections while maintaining the informality that presently characterizes VA procedures is included in new section 4010, entitled "Adjudication procedures", as proposed to be added by section 109 of the Committee bill.

In large measure, the procedures specified in the new section are already generally applied in VA proceedings. These procedures that represent a change in VA proceedings have been included primarily to provide a claimant with a clear opportunity to develop a complete administrative record on the basis of which a reviewing court might understand and evaluate the VA's decision.

Many of the procedures included in the proposed "Adjudication procedures" section are derived from sections of the Administrative Procedure Act (5 U.S.C. 554, 555, and 556). However, before including similar provisions of the Committee bill, the Committee was careful to evaluate each for any detrimental impact on VA proceedings, and rejected provisions that it considered to be potentially disruptive. One example of this approach was in the area of cross-examination of witnesses before the BVA and the concomitant need for authority to subpena such witnesses. A number of witnesses before the Committee strongly emphasized the need for such authorities, basing their position on the belief that cross-examination is a critical tool for testing the assertions and opinions of witnesses. The Committee is well aware that such authority is available in other administrative proceedings for the adjudication of other Federal benefits (for example, under the Social Security Act). However, the Committee believes that such authority could significantly disrupt existing VA adjudications procedures. Thus, in an effort to provide a discovery tool to claimants and to maintain simultaneously the existing informal and supportive tenor of VA proceedings, the Committee bill includes authority for a claimant to submit interrogatories to any person, with mechanisms provided for the enforcement of this authority by authorizing the Administrator, after reviewing the interrogatories and determining their reasonableness, to issue a subpena to compel a witness to answer the questions posed by the claimant at a deposition in a location convenient to the witness.

Among the procedures in the proposed new section that are intended to codify existing procedures are those that would: (1) authorize the Administrator to administer oaths and affirmations, examine witnesses, and receive evidence; (2) provide for the admission of any evidence in VA proceedings, even if such evidence were inadmissible under the rules of evidence applicable to judicial proceedings, subject only to exclusions, if the Administrator provides by regulation therefor, for irrelevant, immaterial, or unduly repetitious evidence; (3) permit a claimant (or claimant's representative) to examine all of the materials to be considered in the proceeding and—on the payment of a fee, which may be waived in specified circumstances, including the claimant's inability to pay—to receive a copy of any or all such materials; (4) provide authority for a hearing officer to disqualify himself or herself on the basis of personal bias or other cause and permit a claimant to challenge a hearing or adjudication officer on such basis; (5) define the contents of the administrative record following Board determination and permit a claimant (or a claimant's representative)—on the payment of a fee, which may be waived in specified circumstances, including the claimant's inability to pay—to receive a copy of the materials constituting the record; and (6) specify that the adjudication and hearing procedures prescribed in title 38 and in regulations of the Administrator are exclusive.

This last provision is included to reaffirm the Committee's belief that the existing internal adjudications procedures of the VA are generally fair and workable and to preclude, therefore, judicial incorporation of other procedures beyond those codified in title 38 or provided by regulations in accordance with such statutory authority. The Committee believes that such a clear statement of the exclusive nature of VA adjudications procedures is necessary to prevent a court from requiring that VA proceedings be in compliance with all Administrative Procedure Act provisions relating to agency adjudication on the grounds that the "trigger" provision in the Administrative Procedure Act (5 U.S.C. 554(a)), which provides that the requirements of that "section apply * * * in every case of adjudication required by statute to be determined on the record after opportunity for any agency hearing" might otherwise be activated by the amendment to section 4004(a) proposed in section 106 of the Committee bill codifying the claimant's right to a hearing before the BVA. Upon similar reasoning, the Committee has chosen to address the judicial review issue by amending rather than repealing section 211(a) of title 38, in light of section 701 of the Administrative Procedure Act, which provides that judicial review of an agency action shall be governed by the provisions of chapter 7 of the APA relating to the scope of and procedures for judicial review, "except to the extent that statutes preclude judicial review."

Development of Administrative Record

The Committee bill includes provisions designed to promote the development of a record of the agency proceedings that would permit a reviewing court to understand and evaluate the proceedings as part of its review without having to remand the matter for further development by the Administrator. The bill also contains provisions, relating

to the administrative proceedings, that provide the claimant with a full opportunity to participate in the development of the record so that all relevant issues would be considered by the Board of Veterans' Appeals prior to any judicial review.

The provision most directly concerned with the development of a sufficient record by the Board is in the form of an amendment to section 4004(d) of title 38, as proposed to be made by section 106(3) of the Committee bill, which would require that each decision of the Board be in writing and include a "statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact, law, and matters of discretion presented on the record", together with the appropriate order in the case. The Committee anticipates that this provision, derived from a similar provision in the Administrative Procedure Act (42 U.S.C. 557(c)), would result in a decisional document from the Board that will enable a claimant to understand, not only the Board's decision but also the precise basis for that decision, and would also permit a claimant to understand the Board's response to the various arguments advanced by the claimant. With such an understanding, the Committee believes that a claimant would be able to make an informed decision on whether or not to request court review, and that, if an appeal is taken, the decisional document should assist the reviewing court to understand and evaluate the VA adjudication action.

New section 4010 of title 38, as proposed to be added by section 109 of the Committee bill, contains provisions intended to provide a claimant with an opportunity to present fully his or her case in support of a claim for benefits. The key provisions would authorize a claimant (or a claimant's authorized representative) to: (1) Present witnesses and evidence (subject only to regulations of the Administrator excluding irrelevant, immaterial or unduly repetitious evidence); (2) present arguments, either orally or in the form of written brief or similar documents, on substantive and procedural issues; (3) submit rebuttal evidence; (4) present medical opinions and request an independent medical opinion; and (5) serve written interrogatories to any person. As discussed earlier, the Committee was guided in its decisions relating to procedural matters by a sense that existing VA procedures are generally fair and workable and that any changes should be made with the intent of preserving such procedures and the informal atmosphere of VA adjudications proceedings while providing claimants with statutory assurance of a full opportunity to have their arguments and evidence presented to the Board.

The new authority for a claimant to submit written interrogatories is, as discussed earlier, an attempt to reconcile two conflicting viewpoints: That claimants should have an opportunity to subpena and cross-examine potential witnesses, and that such an authority would lead to serious disruption of the VA adjudications system and would serve to turn supportive, informal hearings into adversarial ones. Under the provision in the Committee bill, a claimant would have the opportunity to submit interrogatories to any person who, unless that person raised an objection thereto, would have to answer the questions fully and under oath. If the person served with the interrogatories objected to them, the Administrator, pursuant to regulation, would

evaluate the objection, under standards consistent with standards for protective orders applicable in the U.S. district courts (currently set forth in Rule 26(c) of the Federal Rules of Civil Procedure) and accordingly would determine whether the interrogatories were appropriate or were designed to annoy, embarrass, or oppress, or would otherwise place an undue burden or expense on the person to whom they were submitted. Thereafter, the Administrator would issue an order directing that the interrogatories be answered as submitted or as modified or indicating that they need not be answered. If a person served with interrogatories failed to answer them or answered them in an unresponsive manner, the party submitting such interrogatories would be able to request the Administrator to issue a subpena compelling the person's attendance at a deposition on written questions at which the unanswered interrogatories would be asked. The Committee intends that such a subpena would be issued and enforced pursuant to section 3313 of title 38, only if the Administrator was satisfied that the evidence sought by the interrogatories was both relevant and reasonable in scope.

Other Improvements in Internal Procedures

The Committee bill contains a number of provisions in title I that are designed to improve internal VA procedures in order to enhance the agency's ability to carry out its mission of service to veterans and survivors once judicial review becomes available pursuant to the provisions of title III of the Committee bill.

The Committee bill proposes two changes relating to the Board of Veterans' Appeals that are intended to assist the Board in handling the increased workload that may be generated by judicial review of VA decisions and to enable the Congress to monitor that progress.

First, section 103(1) of the Committee bill proposes an expansion of the maximum size of the Board from the present limit of 50 members to 65 members. In authorizing this increase in the size of the Board's membership, the Committee stresses its continuing concern that minority representation among members of the Board of Veterans' Appeals is very limited. As of April 1982, the following constituted the entire minority membership of the Board: 1 black woman and 2 Hispanic-surnamed men out of a total of 45 assigned members. It is the Committee's view that sincere efforts should be made to correct this disparity in representation as rapidly as possible so that the Board will have a prima facie appearance of a fair and impartial body. The prolonged failure to achieve a fairly representative Board membership inevitably has a serious impact on the confidence of minority group veterans and other claimants that their appeals will be fairly and sensitively considered. Thus, the Committee expects that the Administrator will use the opportunity presented by the increase in the size of the Board to undertake an aggressive outreach and recruitment effort aimed at improving the extent of minority representation on the Board.

Second, the Committee bill would add language indicating that the Board should dispose of appeals properly before it in a "timely manner" and requiring that the Chairman of the Board report to the Con-

gress annually on the Board's record of success in achieving that goal, together with an evaluation for the coming fiscal year, of the Board's ability to do so. The language concerning timely disposition of appeals, together with the annual reporting requirement, should afford the Committee the opportunity to monitor closely the Board's ability to handle its caseload after judicial review is allowed so that, if the Board is overwhelmed by new requirements, the Congress will be in a position to take any appropriate remedial action.

Another proposal in title I of the Committee bill, section 108, would expand the availability of independent medical opinions (IMO's) of the type authorized under present section 4009 of title 38—outside evaluations of the medical records before the Board generally made by a medical school faculty member. The new provision is intended, in part, to provide claimants with increased statutory opportunity to influence the development of the record before the Board, but it also reflects the view of the Committee that IMO's may be a valuable tool to assist in resolving claims involving disputed medical evidence. In fiscal year 1981, the Board requested 184 such independent medical opinions, but the VA predicts that, under the proposal in the bill, it would request approximately 2,900 IMO's. These facts indicate to the Committee that current procedures for evaluating the need for an IMO may not result in acquiring such opinions as often as might be desirable to provide assurance that the Board's resolution of a disputed medical issue is, in fact, correct.

Under the procedure proposed in the Committee bill, a claimant would be able to request that the Board seek to secure an IMO when the evidence before the Board indicates a "substantial disagreement" between the "substantiated findings or opinions" of two physicians on an "issue material to the outcome of the case" and such disagreement cannot be resolved in any other way (by, for example, submitting interrogatories to either physician in order to probe the basis for the physician's findings). It is the Committee's intention that, when the evidence before the Board is as described above, the Board, should secure an IMO because, without such an independent opinion, it would appear, in the event that the Board found against the claimant, that it had simply taken the VA physician's view without giving credence to the view expressed by the claimant's physician. In suggesting this position, the Committee does not mean to suggest that the Board would in all cases be required to resolve the disputed matter in the way that the IMO suggests—only that it believes that a well-substantiated IMO that disagrees with VA-physician findings or opinions would be entitled to substantial weight.

The limitation of IMO's to situations where there is a disagreement between the "substantiated" conclusions of two physicians is intended to reflect the view that a bare statement in the record from a private physician setting forth only a medical or legal conclusion, without stating the diagnostic techniques employed and the specific resulting findings and other facts and reasoning that support the conclusion, would not be sufficient to require the Board to secure an IMO. The Committee notes that the Committee bill commits the decision of whether to grant an IMO solely to the discretion of the Administrator and explicitly precludes judicial review of such decision. In so doing, the Committee recognizes that this preclusion of court review could lead to abuse.

However, the Committee believes that the Board will fully and fairly evaluate requests for IMO's pursuant to the provisions of the new authority, and the Committee intends to monitor closely the Board's actions in this regard. To further ensure responsible Board action on IMO requests, a provision is included in the Committee bill to require the Board, if it denies a request for an IMO, to provide a claimant with a statement setting forth the basis for its denial.

Finally, new section 4011 of title 38, as proposed to be added by section 109 of the Committee bill, would require the Administrator, at each procedural stage of a claim, to provide a claimant and the claimant's authorized representative, if any, with written notice, in easily understandable language, of the procedural rights of the claimant and of the opportunity for further review. By inclusion of the requirement that such notices be "in easily understandable language", the Committee intends that the required notices be available in languages other than English, such as Spanish, when a substantial proportion of a particular VA facility's clientele have a limited English-speaking capacity and generally use such other languages as their primary tongue.

Study of Methods To Speed Claims Resolution

Section 110 of the Committee bill would authorize the Administrator to test alternative methods of resolving claims for VA benefits in a speedier fashion and at locations more convenient to claimants' residences.

The Committee is aware of the increased success rate of claimants who appear personally before the Board as compared with the rate of allowance where there is no personal appearance (in the fourth quarter of 1981, the Board's overall allowance rate, on an annualized basis, of claims before it was 12.4 percent; in cases where the claimant had a hearing before the Board at VA's Central Office in Washington, D.C., the allowance rate was 16.5 percent; and, for cases heard by BVA traveling panels, the allowance rate rose to 32.6 percent). Although these statistics are not conclusive, they are very suggestive that a personal appearance before the Board makes a significant difference in achieving favorable resolution of a claim. However, the current alternatives for appearing before the Board (travel to Washington, D.C., or waiting for up to a year or more, in some locations, to appear before a traveling panel) provide little opportunity for such an appearance in a timely manner without the difficulty and expense of travel to Washington, D.C.

This discretionary study would encompass two alternative methods of speeding claims resolution. Under one such alternative the VA would implement an intermediate review panel procedure in not more than three geographic areas, whereby a claimant, following an initial denial at the regional office, could receive a *de novo* hearing, generally in the same regional office, from a new panel of three regional office adjudications personnel. Under the other alternative, the VA would provide, in not more than three other geographic areas, an enhanced schedule of visits by BVA traveling panels. The traveling board would conduct hearings at the selected regional offices on at least a quarterly basis.

The Administrator would be directed to report the results of the study, which would be conducted for a period of 24 months, not later than 6 months after the completion of the study. The report of the study would include an evaluation of the cost of each alternative and the impact of each on the workload of the regional offices in question as well as on the BVA, together with recommendations for such administrative or legislative action, or both, as may be indicated by the results of the study.

Under S. 349 as introduced, this study would have been mandatory upon the Administrator. The Committee bill would make it discretionary. The Committee believes it more appropriate at this time to leave the decision of whether to proceed with such a study, and to what extent, to the Administrator, on the basis of his determination as to the need, the resources available, and the appropriate scope of the study. The Committee emphasizes that it continues to be very concerned that alternatives for speeding claims resolution, particularly those that permit the claim to be resolved at a location as convenient as possible for each claimant, should be explored. The Committee is particularly interested in exploring and understanding the basis for the substantially higher allowance rate (by a ratio of nearly 2-to-1) in cases heard by BVA traveling panels, as compared with the overall BVA allowance rate.

TITLE II: VETERANS' ADMINISTRATION RULE MAKING

Title II of the Committee bill consists of only one substantive provision, which would require that the VA's promulgation of rules and regulations be subject to the provision of the Administrative Procedure Act (APA) relating to rulemaking (5 U.S.C. 553). That APA provision generally requires an agency to provide public notice of proposed rule making (or proposed regulation issuance) in the Federal Register and opportunity for public comment on the proposed rule or regulation. As noted by one scholar in the field of administrative law

> [t]he rulemaking procedure marked out by the Administrative Procedure Act . . . is especially successful. . . . The procedure is both fair and efficient. Much experience shows it works beautifully. K. C. Davis, Administrative Law Text 139 (3d ed. 1972).

Under present law, however, the promulgation of rules by the VA is generally excluded from this APA statutory requirement under the so-called "proprietary matters" exception contained in section 553(a)(2) of title 5. By the terms of section 553(a), the rulemaking provisions do not apply to agency matters involving, among other things, "loans, grants, benefits, or contracts", thereby providing an exception from coverage for the great majority of VA benefit matters. The legislative history of this particular exception suggests that the exclusion was grounded on a belief that, in dealing with the excluded matters, the Government "is in the position of an individual citizen and is concerned with its own property, funds, or contracts". (See Administrative Procedure Act—Legislative History, 79th Congress, 1944–46,

S. Doc. No. 248, 79th Cong., 2d Sess. 358 (1946).) Based on this analysis of the subject matter in question, it was apparently thought that there was no need or role for public participation in agency rulemaking relating to the excepted matters such as there was in matters involving regulatory agencies, which were seen as having a direct impact on non-Government property interests through regulations governing the conduct of private businesses.

The Committee believes that the continued validity of such a distinction is questionable, particularly in light of court decisions over the last decade, such as the Supreme Court decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), that have recognized that individuals have protectible interests in their receipt of various Governmental benefits. In any event, the Committee agrees with Professor Davis' analysis that

> [s]ome of the many exceptions [to the rulemaking provisions] are essential, but some of them probably can and should be scaled down or eliminated, now that the realization is widespread and the prescribed procedure is clearly sound and generally desirable.

The VA, which states that, pursuant to regulation (38 CFR 1.12), it has been in voluntary compliance with the requirements of section 553 since April 1972, indicated in its report on S. 349 that, while it questions the need for this provision, it has no serious objection to having such compliance made mandatory.

TITLE III: JUDICIAL REVIEW

Background

The pros and cons of Judicial Review have been explored at considerable length in the past, and they will not be extensively discussed again here. They have been the subject of much discussion at hearings held before this Committee on June 3, August 25, August 31, September 21, and October 10 of 1977, February 22 and March 22 of 1979, and July 15, 1981, as well as at hearings before the House Committee on Veterans' Affairs on November 13 and November 19, 1980, and were reviewed fairly comprehensively by this Committee 3 years ago in its report on S. 330 (S. Rept. 96–178, 96th Cong., 1st Sess. 35–45 (1979)). The Committee's views on the merits of Judicial Review have not substantially changed since that time, although one concern—that the preclusion of review contained in section 211(a) might ultimately be declared unconstitutional—may no longer be as compelling.[1]

[1] The Committee's concern at the time was based on uncertainty about the possible future application of the landmark Supreme Court decision in Johnson *v.* Robison, 415 U.S. 361 (1974) (section 211(a) does not bar Federal courts from deciding the constitutionality of veterans' benefits legislation).

Since that time, however, case law has developed generally interpreting Johnson *v.* Robison broadly, and section 211(a) narrowly, so as to avoid "the specter of unconstitutionality". Kirkhuff *v.* Cleland, 516 F. Supp. 351, 356 (D.D.C. 1981), appeal pending. *See* de Magno *v.* United States, 636 F.2d 714 (D.C. Cir. 1980). The Supreme Court's analysis in Johnson *v.* Robison has been construed to permit review of the constitutionality of the VA's procedural policies, as in Plato *v.* Roudebush, 397 F. Supp. 1295 (D.Md. 1975) and Devine *v.* Cleland, 616 F.2d 1080 (9th Cir. 1980). In addition, most Federal courts of appeals that have addressed the question have held that section 211(a) does not preclude judicial review on the issue of whether a particular VA regulation was promulgated in excess of the Administrator's statutory authority. This line of cases started with Wayne

Of the reasons cited in support of judicial review in the report on S. 330, most remain valid and compelling today. The Committee continues to believe that (1) inasmuch as administrative determinations concerning virtually all other Federal benefits are subject to judicial review (the only significant exception being, under 5 U.S.C. § 8128(b), determinations concerning benefits under the Federal Employees Compensation Act), it is both unjustifiable and fundamentally unfair to deny to veteran claimants such a common and highly valued right; (2) although such disparate treatment may at one time have been justifiable on the basis that veterans' benefits were considered to be, as stated in *Hahn* v. *Gray*, 203 F.2d 625, 626 (D.C. Cir. 1953), "mere gratuities," this notion must be considered to have been substantially eroded by the decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), in which the Supreme Court held that welfare benefits are more in the nature of a right than a privilege for purposes of due process protections; and (3) although the Committee has great confidence in the competence and good faith of the individual adjudicators and the adjudicative bodies within the VA, there is and will inevitably continue to be some proportion of cases, however small, that are wrongly decided by the BVA, where the only hope for correcting the resulting injustice lies in judicial review.

The Committee emphasizes that its attitude toward judicial review should not be construed as a major criticism of the way claims are presently adjudicated by, or veterans represented before, the VA. Rather, it reflects a faith in the system of checks and balances embodied in Federal court review, a system which can only enhance the likelihood that the truth will be found and a correct and just decision reached, and which, at the very least, will help overcome the perception, in some claimants' minds, that the present claims adjudication process is unfair in denying veterans their "day in court." As was stated by Mr. Ronald Simon on behalf of The National Veterans Law Center at the Committee's hearing on July 15, 1981:

> The existence of a Supreme Court does not imply the inadequacy, arbitrariness, or wrongness of the lower courts. Nor does the existence of the judicial system imply the wrongness or illegality of the other branches. The existence of the courts and legal system of which they are a part is merely the way in which disputes are resolved in our society. . . .

State University *v.* Cleland, 590 F.2d 627 (6th Cir. 1978), and continued with Merged Area X (Education) *v.* Cleland, 604 F.2d 1075 (8th Cir. 1979), and University of Maryland *v.* Cleland, 621 F.2d 1002 (9th Cir. 1980); (the Court of Appeals for the District of Columbia Circuit has not directly addressed the issue but appears similarly inclined—*see* Carter *v.* Cleland, 643 F.2d 1 (D.C. Cir. 1980), and Ralpho *v.* Bell, 569 F.2d 607 (D.C. Cir. 1977)—while the Court of Appeals for the Fifth Circuit has taken a contrary view and limited Johnson *v.* Robison to challenges to the constitutionality of a statute, in Anderson *v.* Veterans' Administration, 559 F.2d 935 (5th Cir. 1977)).

Section 211(a) has also been held to be ineffective as a bar in cases concerning the validity of an affirmative VA action against an individual—such as a set-off against insurance benefits in order to recover a claim asserted against an individual by the VA, as in de Magno, *supra*—expressly in order to avoid giving section 211(a) what the court felt would have been an unconstitutional reading. *See* DiSilvestro *v.* United States, 405 F.2d 150 (2d Cir. 1968). Otherwise, section 211(a) continues to be construed so as to preclude review of individual factual determinations or even of agency rules and practices that are nonbinding on the BVA. *Compare* Carter, *supra*, with Gott *v.* Nimmo, C.A. No. 80-906, D.D.C. September 30, 1981, *app. pending*. On the other hand, it still remains a possibility that, in a pure individual benefits context, a court may be confronted with a factual determination so shocking that it would feel compelled to reach the constitutional question and invalidate, on due process grounds, the section 211(a) bar on its face. (*See* de Magno, *supra*, at 722, n. 13.)

> Unfortunately, the prohibition against judicial review has led to a special status for the VA in the minds of veterans and the public. The product of the prohibition against judicial review is mistrust, suspicion and lack of confidence. . . . Review by the courts would provide an explanation of decision-making and a ventilation of the frustrations of veterans.

Although the conceptual merits of judicial review legislation had been extensively debated prior to the introduction of S. 349, primarily in connection with the Committee's consideration of S. 364 in the 95th Congress, most of the witnesses who testified on S. 349 took the opportunity to offer some general testimony.

All but one of the veterans' service organizations that testified expressed general support for judicial review legislation. Most significantly, Mr. Donald Schwab, National Legislative Director of the Veterans of Foreign Wars, testified that the VFW, after a "lengthy and lively debate" at its national convention in 1979, abandoned its previous opposition to judicial review and adopted a resolution supporting "legislation to provide judicial review of Veterans' Administration claims decisions pertaining to matter of law and regulations, insofar as the merits of the claims are concerned, and review of facts that are alleged to be arbitrary and/or capricious," a position that was reaffirmed during the VFW's 1981 convention.

Similarly, Mr. Gabriel P. Brinsky, the National Service and Legislative Director of AMVETS, testified that: "AMVETS is in favor of legislation which would provide for limited judicial review as to the legality of regulations and the correctness of legal interpretations but we oppose any judicial review de novo or otherwise on the merits of the claim adjudicated by the Veterans' Administration." Mr. Gordon H. Mansfield, Associate Legislative Director of the Paralyzed Veterans of America, testified that "PVA supports judicial review of *law* but not of *fact*" (emphasis in the original), primarily out of deference to the BVA's expertise as a finder of fact. And Mr. John F. Heilman, National Legislative Director of the Disabled American Veterans, indicated in a written statement submitted for the record that although the DAV does not support the specific form of judicial review incorporated in S. 349, it does "believe that a veteran, or the dependent or survivor of a veteran, whose claim has been denied in the VA appellate process should be able to seek further redress in judicial proceedings outside the Veterans' Administration."

Other testimony in support of the judicial review provisions of S. 349 came from representatives of the American Bar Association, The National Veterans Law Center, and COMVETS.

The only major veterans' organization that remains opposed to judicial review is The American Legion. Mr. Paul S. Egan, Assistant Director of the Legion's National Legislative Commission, indicated a preference for the present VA adjudication system, and a concern that judicial review would place the veteran in more of an "adversary relationship" with the VA than is presently the case. The Committee notes, however, that it is aware of substantial disagreement on this issue within The American Legion. The Committee was advised, in a September 25, 1981, letter from Robert W. Valimont, Department Judge

Advocate of The American Legion, Department of Pennsylvania, that his state Department—the largest in the national Legion organization—as well as delegations from Colorado, Massachusetts and the Philippines, had submitted resolutions to the 1981 National Convention in support of judicial review.

Opposition was also expressed by representatives of the VA, in spite of its general support for the provisions of S. 330 in the 96th Congress. Robert E. Coy, Acting General Counsel of the VA, indicated that although the VA supports the judicially created right of review of constitutional questions and of challenges to VA regulations and procedures, the broader right of review provided in S. 349 is "not warranted." The stated reasons for this position were the administrative burden and cost of the bill, and a belief that "essentially," due process is provided under the present adjudication process.

Thus, in light of all the relevant considerations, the Committee continues to believe that providing an opportunity for those aggrieved by VA decisions to have such decisions reviewed by a court, in a manner similar to that enjoyed by claimants before almost all other Federal agencies, is necessary in order to provide such claimants with fundamental justice. To continue to inform claimants before the VA that benefits to which they are entitled by law could be wrongly denied and that there is no remedy for such a wrongful denial, no longer seems to be a viable position. In addition, the Committee believes that judicial review, by opening the decisions of the VA to court scrutiny, will have a salutary effect on such decisions and on the VA decisionmaking process in general by involving the judiciary as a check on agency actions. Although the VA has a unique and vital mission of providing service to our Nation's veterans and their survivors, it is, at the same time, a large and complex Federal agency, and providing an opportunity for independent outside review of the processes and procedures of the agency should prove beneficial to those with claims or other matters before the VA.

Finally, the Committee believes that VA claimants in all parts of the country should have uniform access to the judicial system rather than having to litigate before various district courts and appellate court panels the questions of whether and to what extent section 211(a) operates as a bar in a particular case.[2] Not only does this litigation consume considerable time and money of the claimant—as well as of the government—but it has and may continue to yield conflicting results on the jurisdictional question. This lack of uniformity is further aggravated by the VA's and the Department of Justice's continued practice of raising the section 211(a) bar in cases where no individual adjudications are involved. This very recently occurred in the case of Gott *v.* Nimmo, C.A. No. 80–906 (D.D.C., September 30, 1981), *app. pending*, in which the district court invalidated and required revision of certain agency guidelines and instructions regarding the adjudication of claims arising out of exposure to nuclear detonation radiation. The Committee has been informed that the United States is appealing that decision and intends to raise the section 211(a) bar on appeal.

[2] *See generally* footnote 1, *supra*, and materials cited therein.

Provisions of the Committee Bill

Although the Committee believed that providing opportunity for judicial review was an appropriate action, it was concerned that the specific formula chosen must reflect the Committee's intention to retain the BVA as the primary, expert arbiter of VA claims matters. The Committee was aware of the criticism of the experience in cases appealed to court involving disability benefits under the Social Security Act, and particularly of concerns that have been expressed in that regard that reviewing courts have felt too free to substitute their judgment for that of the administrative tribunal, without having seen or heard the witnesses and without the expertise of the administrative decision makers.

The Committee believes that such a situation must be avoided in relation to VA claims, and the provisions of the Committee bill have been framed accordingly.

Right of Review

Section 302 of the Committee bill would provide for judicial review of a final decision of the Administrator adverse to a claimant in a matter involving a claim for benefits under any law administered by the VA. An action to commence such a review would have to be brought within 180 days of the date the notice of the Board's decision was mailed to the claimant pursuant to section 4004 of title 38, as proposed to be amended by section 106 of the Committee bill. The term "claim for benefits" would be defined to include not only decisions relating to an initial claim for benefits, but also decisions concerning a reduction in the amount of a benefit, or a suspension or termination of benefits. The purpose of this provision is to address a judicial inclination, exhibited prior to the 1970 amendment of section 211(a) of title 38, to define "claim for benefits" to include only the claim as initially filed and not any challenge to—or request for—subsequent VA action thereon.

Final action of the Administrator, a prerequisite to bringing an action under the authority proposed in the Committee bill, would be defined to include not only a decision on the merits pursuant to section 4004(a), as proposed to be amended by section 106 of the Committee bill, but also a refusal to reopen a claim pursuant to section 4004(b), as proposed to be amended by section 106 of the Committee bill, or a refusal—on the basis of nonconformity with present chapter 71 provisions relating to the form or manner of appeals action, pursuant to present section 4008, or a lack of timeliness, pursuant to present section 4005—to consider a claim. Of course, the Committee bill specifies that if a court reviews a final decision rendered on a basis other than the merits of the claim, its review would be restricted to a review of the lawfulness of the Board's action on that basis and it could not consider the merits of the claim, but would have to return the matter to the Board for a decision on the merits if it held the Board's action unlawful.

Scope of Review

In framing the judicial review provisions of the bill, the Committee's single greatest concern was defining the scope of review to be

applied by a reviewing court. As discussed above, the Committee is keenly aware of the criticism of the experience with court review of disability claims under the Social Security Act, and the Committee wishes to prevent such a situation from arising in the area of VA claims cases.

In its effort to address this situation the Committee has examined numerous potential formulations of the scope of review, and the provision contained in the present bill is the third such formulation to have actually been incorporated into this legislation since its introduction in the 95th Congress.

The first formulation was the "substantial evidence" test presently applied under the Administrative Procedure Act generally and, in particular, in social security disability cases. In its agency report on S. 364, 95th Congress, the VA advocated "that the scope of review of individual cases should be based on the substantial evidence test" and S. 330, as introduced in the 96th Congress, included that formula in the scope of review provision. Under that test, as set forth in the Administrative Procedure Act (5 U.S.C. 706), a court is required to set aside an agency decision "unsupported by substantial evidence". However, the exact meaning of that phrase and court application of it have been far from clear or consistent. There has been substantial criticism that courts use this standard in reviewing disability claims cases under the Social Security Act so as to freely substitute their judgment for that of the Secretary. As Professor Kenneth C. Davis noted:

> Whatever impression a literal-minded reader may get from the words in the statute book, the plain reality is that the substantial-evidence rule as the courts apply it is a variable. K. C. Davis, Administrative Law Text 530 (3d ed. 1972).

Based on a review of the testimony received at the hearings on S. 330 and concerns expressed by various commentators, including cautions presented by the VA in its 1979 testimony, the Committee rejected the "substantial evidence" test.

Consideration was given to replacing it with a formula that was then (during the 96th Congress) being proposed by the Administration for review of disability cases under the Social Security Act, under which questions of law would be subject to review but not questions of fact. However, the Committee was quite concerned that this formula—might be far easier to describe than to apply in actual practice. It is the Committee's view that most VA cases, while involving resolution of factual issues, present a mixture of legal and factual questions. For example, a claim for service-connected compensation could require resolution of some simple factual issues, such as whether the veteran had the requisite service in the Armed Forces and whether, in fact, the veteran is currently suffering from a disability. However, the same claim could also require the application of a complex rating schedule to the apparent disability to determine the degree of service-connection, which would not be a simple factual determination. Likewise, the decision as to the time of the onset of the disability might be very difficult if the veteran's military records did not contain a clear statement describing an occurrence during the period of service—again, a question that is not simply factual in its makeup, especially if

the disability in question is listed in present section 321, which provides for statutory presumptions of service-connection if the disability became manifest within a stated period of time after the end of the individual's period of service.

In addition, the same claim for service-connected compensation could ultimately be resolved on the basis of the legal sufficiency of evidence relating to a factual matter—for example, whether particular affidavits from individuals with whom the veteran served, relating to an alleged occurrence, are sufficient to support a finding of service connection in the absence of any supporting evidence in the veteran's military records—another situation in which a formula of permitting review of legal questions while precluding review of questions of fact might prove unworkable. A court, feeling bound by the precise terms of such a preclusion, might refuse to review mixed questions of law and fact so as to avoid any review of a factual issue, thereby leaving a claimant with incomplete judicial review; or a court might feel free to examine all questions on the record by characterizing some facet of a particular question as legal, thereby allowing review, under no significant restraints. As Professor Kenneth Davis has written, describing civil actions for damages:

> In any particular case the question whether the defendant was negligent may be a question of fact or a question of law or both, depending on whether the parties are in dispute about what the defendant did or whether they agree on what he did and are in dispute about the legal consequences, or both. The same kind of analysis can be made of all questions of application of legal concepts to facts. K. C. Davis, Administrative Law Text 545 (3d ed. 1972).

For these reasons, the Committee decided against including a provision permitting review of questions of law only.

The version of S. 330 that was finally marked up, reported by the Committee and passed by the Senate in September 1979 contained a scope of review provision that would have permitted review of the Administrator's findings of fact, but would have allowed them to be reversed only if they were determined to be arbitrary and capricious or to constitute an abuse of the Administrator's discretion. In addition S. 330 included a provision specifying that, even on a finding by the reviewing court that a BVA factual determination was arbitrary or capricious or constituted an abuse of discretion, the court would not have been authorized to reverse the Administrator's determination on the issue without first remanding the case, for a time-limited period, to the Administrator, so as to provide the Administrator with the opportunity to reconsider or substantiate the record. This formula was intended to strike a balance between the proper functions of the reviewing court and the Administrator by permitting the court to exercise its own judgment in resolving issues of law but restricting narrowly the court's review of questions of fact.

It was this standard of review that was contained in title III of S. 349 as introduced in the present Congress. The Committee felt, however, that some further refinement and clarification of this standard was necessary. Accordingly, section 302 of the Committee bill con-

tains a totally new scope-of-review formulation for factual determinations made by the BVA: That a finding of fact made in connection with an individual benefits determination may be set aside by a reviewing court only when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if it were not set aside. The Committee bill retains the automatic remand provision from S. 330.

Although it continues to favor a very restrictive standard of review for factual questions, the Committee was concerned that use of the "arbitrary and capricious" formulation might result in some substantial confusion as to its precise meaning and application. As far as its application is concerned, the Committee notes that the "arbitrary and capricious" standard was directly derived from the Administrative Procedure Act, at title 5, United States Code, section 706(2)(A). However, the "arbitrary and capricious" standard was generally intended to be applied in the review of fact determinations made in rulemaking processes—not those made in individual claims adjudications. Thus, the Committee is concerned that, if that standard were lifted out of the rulemaking context and made applicable to court review of factual findings in veterans claims adjudications, courts might not appreciate the narrowness of the scope of review intended by the Committee in light of the special circumstances surrounding the VA adjudications process.

But more importantly, the "arbitrary and capricious" standard has been the subject of a considerable amount of judicial confusion concerning its precise meaning. One interpretation—that favored by the Committee in its report on S. 330—is that the "arbitrary and capricious" standard represents a narrower judicial inquiry than is available under the "substantial evidence" test. As the Supreme Court stated in *Abbot Laboratories* v. *Gardner*, 387 U.S. 136, at 143 (1967), in discussing the APA provisions relating to scope of review:

> The act as it was finally passed compromised the matter by allowing an appeal on a record with a "substantial evidence" test, affording a considerably more generous judicial review than the "arbitrary and capricious" test available in the traditional injunctive suit.

There is also some support for the conclusion that the "arbitrary and capricious" standard calls for a broader judicial inquiry than is available under the "substantial evidence" test. This view originated with the Supreme Court's statement in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, at 416 (1971) that an administrative decision may be found to be arbitrary and capricious when it appears to have been based on a "clear error of judgment." The confusion has arisen from the similarity of this language to the "clearly erroneous" test used to review the factual findings of a trial court sitting without a jury—a test which is treated in the case law as permitting a broader judicial inquiry than even the "substantial evidence" test. The Court added to this confusion by stating in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284 (1974) that "though an agency's finding may be supported by substantial evidence . . ., it may nonetheless reflect arbitrary and capricious action."

Still a third supportable point of view is that there is no real difference between the "arbitrary and capricious" and "substantial evidence"

tests. This view seems to derive primarily from the Supreme Court's use of similar terms to define the two tests: The latter encompasses such evidence as a "reasonable mind" would accept as persuasive (see *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966)), while the former requires such evidence as would furnish a "rational basis" for the agency action (see *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra* at 290).

The present status of the relative scopes of these two tests has been summarized by Professor Kenneth Davis as follows:

> The practical question for administrative law is whether the substantial evidence test and the arbitrary or capricious test are equivalents or whether they differ, and, if they differ, which one calls for broader review. Four possibilities and a quick reason for each are: (1) The Overton Park language is inadvertent, so that the Supreme Court's remark in the Abbott case, long accepted by all, continues, and the substantial evidence test means "more generous" review than the arbitrary or capricious test. (2) Exactly the opposite is the law, for the Court in Overton Park treated the arbitrary or capricious test as equivalent to the clearly erroneous test, which has consistently been treated by the courts as calling for a broader judicial inquiry than is proper under the substantial evidence test. (3) The two tests become equivalents, because some law makes one broader than the other but some law makes the other broader than the one. (4) Refined differences in the two tests do not matter, because all federal judges understand the broad theory that they should refrain from substitution of judgment except on questions of law on which they are especially qualified, and the degree of intensity of review of other questions inevitably depends far more on other factors than on somewhat unreal refinements in the formulas; a judge who gets the impression that an administrator has been conscientious, careful, and fair is unlikely to make a full inquiry into the possibility that a judgment may be "clearly wrong," whereas a judge who has reason for little confidence in an administrator may come close to substituting judgment.

K. C. Davis, Administrative Law in the Seventies 649 (1976).

Thus, the Committee was concerned that the "arbitrary and capricious" standard, if incorporated into this judicial review legislation, would carry with it this confused body of law. Moreover, although the Committee might include language in its report expressing with great clarity its intentions regarding the scope or definition of the standard, the Committee recognizes some risk that a reviewing court, confronted with a scope of review provision identical to a familiar APA provision, might feel no compulsion to look as far as the legislative history, following the settled judicial doctrine of statutory construction that only those statutes which are of doubtful meaning are subject to the process of statutory interpretation. (See *Jay* v. *Boyd*, 351 U.S. 345 (1956), Sutherland Statutory Construction § 45.02 (3d.ed. 1973)).

The new scope of review provision added by the Committee amendment to S. 349—"so utterly lacking in a rational basis in the evidence

that a manifest and grievous injustice would result if (the finding) were not set aside"—represents an effort to address these concerns. It is not patterned after any scope of review provision in any existing statute (the Committee notes, however, that the phrase "rational basis" is derived from case law using that phrase in articulating a narrow construction of the "arbitrary and capricious" standard, as in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc. supra*, at 283, 285, and 290), largely in order to increase the likelihood that the Committee's intention to allow only a very narrow review of factual determinations in individual benefits adjudications will be followed by the courts and will not be frustrated by judicial practice developed in other contexts. The Committee emphasizes its view that judicial review of VA decision presents a unique situation in several respects—most notably, the informal nature of proceedings before the VA, and the availability of free representation by skilled service officers of the major national veterans' organizations—and that a central theme in drafting this legislation has been to preserve those unique and desirable aspects as much as possible while enhancing them by the addition of a right of judicial review. Moreover, by framing a new standard of review, the Committee expects that, to the extent that the Committee's intentions regarding the scope of reviews are not plain on the face of the statute, reviewing courts will seek clarification from the legislative history of this legislation, thus simplifying to some extent the court's task of ascertaining the precise meaning of the provision and avoiding the risk that it will be given an unduly broad interpretation.

This new scope-of-review provision is intended to permit a reviewing court to reverse a VA claims decision on the basis of a finding of fact made in the adjudication process only when the court is certain that the decision was wrong. It is intended to be a substantially narrower standard than the "substantial evidence" test. It is intended to afford the maximum possible deference to the BVA's expertise as an arbiter of the specialized types of factual issues that arise in the context of claims for VA benefits, while still recognizing and providing for the possibility of error in BVA factual determinations, and the need, however seldom it may arise, for some avenue of redress against glaring errors. The Committee strongly believes that some form of meaningful factual review is an essential component of any scheme to afford to veterans a comparable measure of the judicial review rights now afforded to claimants for virtually all other Federal benefits.

The Committee notes that although this standard of review for factual findings is new, the other major scope of review provisions contained in proposed section 4026(a)(1) through (a)(3) are derived specifically from section 706 of the APA. Thus, it is the Committee's intention that the court shall have the same authority as it would in cases arising under the APA to review and act upon questions other than matters of material fact made in reaching a decision on an individual claim for VA benefits—such as questions concerning the validity of a rule or regulation, (including the application of the "arbitrary and capricious" standard to a challenge to an agency factual determination made in the context of issuing a rule or regulation) constitutional challenges, or challenges to VA procedures. The principal substantive differences from section 706 of the APA are the substitution of the new "rational basis" test for the "substantial evidence" test and

the initial remand requirement applicable to such factual review situations, as well as the express preclusion of trial de novo by the reviewing court and the elimination of the requirement that the court review the whole administrative record, both of which are discussed below.

In addition to providing for a narrow scope of review of factual findings in individual benefits adjudications, the Committee bill includes several other provisions intended to give deference to the BVA's role as the final, expert arbiter of fact. Proposed section 4026(a) of title 38 contains a provision, as mentioned above, specifying that, even on a finding by the reviewing court that a BVA factual determination lacked a sufficient rational basis, the court may not reverse the determination on the issue without first remanding the case, for a time-limited period, to the Administrator, who shall then have an opportunity to reconsider or substantiate the record.

Moreover, another change from S. 349 as introduced is that the court would not be required to review the entire administrative record, as is presently the case under section 706 of the APA, but only such portions as the parties bring to the court's attention in support of their arguments. The entire record would of course be before the court pursuant to subsection (d) of proposed section 4025 of title 38 and subject to review in the event that the court wishes to examine portions of the record other than those cited by the parties. The purpose of this provision is to minimize the burden imposed on reviewing courts by this legislation and to preserve judicial time and resources, by generally relying on the parties to identify and focus attention on the issues and the relevant factual elements.

The Committee is aware that some commentators have suggested that allowing a court any review of the facts in a case would ultimately encourage a de novo review and court substitution of its findings on factual determinations for that of the administrative decision maker. However, the Committee does not believe that such a result is likely—especially in light of the specific preclusion, set forth in subsection (c) of proposed section 4026 of title 38, of trial de novo by the court on the Administrator's findings of fact—and the totally new scope-of-review provisions—and suggests that this view indicates a belief that reviewing courts will not follow Congressional mandates in conducting statutorily-authorized review of administrative proceedings. The Committee does not accept such a view and believes that a court, using the standards set forth in the Committee bill, will not disturb findings of fact made by the Administrator unless it determines that such findings are clearly lacking a rational basis in the evidentiary record. Even upon making such a finding, the Committee would stress, the court would be required to return the matter to the Administrator for a further opportunity to reconsider the record or to substantiate the finding in question.

A final provision included in the Committee bill under the scope-of-review provisions in section 302 would incorporate a reference to the "rule of prejudicial error" as included in the APA (5 U.S.C. 706) so as to limit still further a court's role on review. Acting in accordance with the prejudicial error rule, a court should pass over errors in the record of the administrative proceedings that the court finds not to be significant to the outcome of the matter. As the U.S. Court of Appeals for the Ninth Circuit noted in *NLRB* v. *Seine and Line Fishermen's Union of San Pedro*, 374 F.2d 974, 981 (9th Cir. 1967):

> [A] court, on review of an administrative determination, should take due account of the rule of prejudicial error. Procedural irregularities are not per se prejudicial; each case must be determined on its individual facts and, if the errors are deemed to be minor and insubstantial, the administrative order should be enforced notwithstanding.

Thus, by an express inclusion of a reference to the rule of prejudicial error, the Committee is suggesting that a reviewing court should consider reversal only after determining that the identified error caused substantial prejudice to the claimant's case.

Remand Provisions

Section 302 of the Committee bill contains provisions authorizing three additional forms of remands, in addition to the one discussed above in connection with the scope-of-review provisions, that would apply once a matter has been appealed to court.

Under the first, a court would be required to remand the case to the Administrator, upon the Administrator's request, after it is appealed to court but before the Administrator files an answer, for a single reconsideration, with such reconsideration to be completed within 90 days of the remand or the matter would be returned to court. This provision, which is based on similar authority in section 205(g) of the Social Security Act (42 U.S.C. 405(g)), is included in the Committee bill in order to provide a mechanism whereby the time and expense of litigation could possibly be avoided through VA reconsideration of the case and possible agreement with the claimant. The Committee is aware of the criticism that has been made of similar authority under the Social Security Act to the effect that the Secretary should be required to show good cause for the requested call-back, but the Committee believes that the modifications made in the call-back authority as it appears in the Committee bill, limiting the call-back to a single, time-limited period, should satisfactorily guard against possible abuses of the agency authority.

The second remand provision would permit the court, in its discretion, to remand a case at any time after the Administrator files an answer; and the third would require a court to remand a matter when either party applies for leave to adduce further evidence and shows good cause for the requested remand. The purpose and intent of these remand provisions were discussed in some detail in the Committee's report on S. 330 (S. Rept. No. 96–178 at 51–52) and will not be repeated in this report except to note the Committee's view that they reflect the importance that the Committee attaches to resolving claims within the VA whenever possible.

Sunset Provision

Section 302 of the Committee bill would provide that the jurisdiction of Federal courts to review decisions of the VA relating to claims for benefits as provided for in the new subchapter II of chapter 71 added to title 38 by the Committee bill will not apply to claims for benefits, the initial claim for which is filed with the Administrator pursuant

to present section 3001(a) after the end of the fifth fiscal year following the fiscal year in which the Act becomes effective. This 5-year "sunset" provision on new claims is designed to require a thorough Congressional evaluation of the operation and effects of the new judicial review provisions before they are made permanent or are further extended.

Although the Committee recognizes that "sunset" provisions are normally associated with specific programmatic rather than procedural efforts, the Committee believes that, particularly in light of the implications of permitting judicial review for the VA's procedures, the 5-year "sunset" provision provides an important safeguard to ensure further Congressional scrutiny of the full impact of the changes made by the Committee bill.

TITLE IV: ATTORNEYS' FEES

Background

Title IV of the Committee bill contains provisions that would substantially revise the current title 38 provision that generally limits to $10 the amount an attorney may receive for representing an individual in connection with a claim for benefits (present section 3404). This current limitation, which has statutory precedents dating back to the Civil War, was set in 1924 as part of the codification of the War-Risk Insurance Act as the World War Veterans' Act, 43 Stat. 628 (June 7, 1924). Present section 3404(c) limits the amount an attorney may receive for services rendered in connection with "any one claim" to a maximum of $10; to be eligible for this fee, which is paid to the attorney from the monetary benefits awarded to the claimant, the claim must be allowed.

Although the limit on the amount an attorney may receive under current law is not directly linked to preclusion of judicial review, it seems clear that the bar to judicial review has contributed to nonparticipation of attorneys in VA claims matters. In recent years, only approximately 2 percent of all claimants before the Board of Veterans' Appeals were represented by attorneys (Annual Report 1980, Administrator of Veterans' Affairs, page 93), a phenomenon that is undoubtedly attributable to the limit on the fee that an attorney may receive. Thus, the new right to judicial review as proposed in title III of the Committee bill would be a hollow right indeed without some easing of the limitation on attorneys' fees. Without the assistance of an attorney, a claimant would effectively be precluded from filing a proper appeal of an adverse VA decision in Federal court and, without a change in the $10 limitation, there would continue to be little or no attorney representation in VA claims cases.

Recognizing this fact, the Committee is concerned that any changes relating to attorneys' fees be made carefully so as not to induce unnecessary retention of attorneys by VA claimants and not to disrupt unnecessarily the very effective network of nonattorney resources that has evolved in the absence of significant attorney involvement in VA claims matters. The mainstays of that network are veterans' service officers, employees of national veterans' service organizations, and other organizations approved pursuant to present section 3402 of title

38, who provide representation without charge to veterans and other claimants before the VA, without regard to whether the individual claimant is a member of the service officer's organization. It is widely recognized, as the VA noted in its agency report on S. 349, at page 22, (reprinted later in this report) that veterans' service officers "render sophisticated and expert assistance in prosecuting a claim", and the Committee strongly believes that the availability of their services should be maintained and fostered.

The Committee, in its consideration of the issue of attorneys' fees also recognized that the existing limit on attorneys' fees is generally appropriate with respect to the initial claims stage in the sense that applying for VA benefits is a relatively uncomplicated procedure, with the VA generally securing the relevant military records as well as evaluating the merits of the claim. In light of the availability of national service officers and other nonlegal forms of free assistance, there would seem to be no need for the assistance of an attorney in order to initiate the claims process by completing and filing an application. Moreover, even if the initial decision is adverse, the Committee believes that it may be unnecessary for a claimant to incur the substantial expenses for attorney representation that may be involved in appealing the case for the first time to the BVA. The claimant may well prevail, as many claimants currently do, without legal representation when the case is first before the BVA. However, once the BVA renders a decision adverse to the claimant on the merits, the need for the assistance of an attorney is then markedly greater with respect to such issues as seeking a reopening and reconsideration and deciding whether to proceed to court. Thus, continuing to discourage attorney representation at the initial application, decision and appeal stages would, the Committee believes, appropriately serve to protect claimant's benefits without prejudicing the claimant's ability to obtain effective legal representation at a later point.

As was discussed in the VA's agency report on S. 330 (VA report on S. 330 at pages 16–17 (reprinted at pages 98–99 of S. Rept. No. 96–178)), the basis for Congressional action, first after the Civil War and then after World War I, limiting the amount an attorney could receive for representing a claimant before the VA was grounded in a belief that the lawyers of that day were unscrupulous and were taking unfair advantage of veterans by retaining an unwarranted portion of the veterans' statutory entitlement in return for very limited legal assistance. Whatever the merits of such a view at the time that the limitation was imposed, and despite numerous court opinions upholding the validity of the statutory limitation in the face of challenges to its constitutionality (see, e.g., *Gendron* v. *Saxbe*, 389 F. Supp. 1303 (C.D. Cal.), *aff'd mem. sub nom*, *Gendron* v. *Levi*, 423 U.S. 802 (1975); *Staub* v. *Roudebush*, 574 F. 2d 637 (D.C. Cir. 1978)), it is the Committee's position that such a view of today's organized bar, particularly in light of the widespread network of local bar associations that now generally police attorney behavior, is no longer tenable.

The Committee is also of the view that the current statutory limitation is an undue hindrance on the rights of veterans and other claimants to select representatives of their own choosing to represent them in VA matters. As noted above, there is a strong and vital sys-

tem of veterans service officers who provide excellent representation at no cost to claimants. The Committee fully expects and believes that this system will continue and prosper, undiminished by the new right of judicial review and opportunity for attorney participation created in this legislation. However, an individual should not be arbitrarily restricted in retaining an attorney, whether such representation is desired for reasons of personal preference or because of a concern that the claim is likely to be denied a second time by the Board of Veterans' Appeals and will be appealed to court. A claimant could well conclude, for example, that some further development of the administrative record in a complex case would be of critical importance while the matter is still before the agency and that an attorney would be better able to so develop the record.

Based on these various considerations and after reviewing and incorporating suggestions from a wide variety of sources, the Committee developed a formula for allowable attorneys' fees for representation of a VA benefits claimant. This formula is intended to continue to restrict attorney representation in the initial claims process, and to authorize reasonable attorneys' fees, thereafter within certain specified limits, for representation before the VA and for court approval of a reasonable fee, within certain limitations, for attorney representation in court proceedings.

Fee Approval for Attorney Representation Within the VA

The Committee bill contains provisions authorizing two levels of fees for representation in conjunction with claims resolved within the VA. For a claim resolved either prior to or in the first BVA decision on the merits, in the Committee bill would retain the present $10 limit on the amount an attorney may receive. As discussed above, the Committee believes that there is no compelling justification for attorney representation at this initial level since, in most instances, all a claimant need do is file the claim and the agency will obtain the military service and medical treatment records, where appropriate, necessary to make an initial evaluation of the merits of a claim. Should the materials in the records be insufficient to support a decision on the claim, an effort is made to inform the veteran or other claimant as to the nature of the additional evidence that is required and the possible means of acquiring such evidence.

If an initial application for a claim is denied, all a claimant need do to initiate an appeal is to file a notice of disagreement pursuant to present section 4005. The notice of disagreement is a very simple document; as described in the applicable VA regulation (38 CFR 19.113):

> The notice should be in terms which can be reasonably construed as evidencing a desire for review of that determination. It need not be couched in specific language. Specific allegations of error of fact or law are not required.

Following the filing of a notice of disagreement, the VA office that made the original determination (called the agency of original jurisdiction) reviews the matter, pursuant to present section 4005(d)(1), in a final attempt to resolve the disagreement. Again at this stage, no

compelling need for attorney representation is foreseen since the VA assumes the primary responsibility for assuring that the claim is properly considered. Should such further review action not resolve the matter in a manner acceptable to the claimant, the VA prepares and provides to the claimant a statement of the case pursuant to present section 4005(d)(1). A statement of the case must include:

> (A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed;
>
> (B) A citation or discussion of the pertinent law, regulations, and, where applicable, the provisions of the Schedule for Rating Disabilities;
>
> (C) The decision on such issue or issues and a summary of the reasons therefor.

If the claimant is still not satisfied after receiving the statement of the case, an appeal may be taken to the Board of Veterans' Appeals pursuant to the provisions of present section 4005. If the Board's decision is adverse to the claimant, it is at that point that under section 401 of the Committee bill, the $10 fee limitation would be lifted. At that time, the claimant would be afforded a realistic opportunity to obtain legal representation for purposes of proceeding further, either at the agency level (to the extent that reopening or reconsideration is authorized under section 4004, as proposed to be amended by section 106 of the Committee bill) or at the Federal district court level. For claims so pursued and resolved at the agency level, the amendment to the Committee bill would allow the Administrator to approve a reasonable fee not in excess of $500 or, in the event that a claimant and an attorney have entered into a contingent-fee agreement, an amount not in excess of 25 per centum of any past-due benefits awarded in the case. Under the proposal in the Committee bill, a claimant and an attorney would still be able to agree to a fee lower than the maximum authorized and the Administrator would be limited to approving the agreed-upon amount.

Under section 401 of S. 349 as introduced, the $10 fee limitation would have been lifted at the time that the statement of the case is issued. The Committee bill would postpone that change in the fee limitation until after the BVA has decided the case once—a provision that is intended to be viewed in conjunction with the change made in section 106(2) of the Committee bill under which two separate authorities would exist for the reopening and reconsideration of a final BVA decision. Thus, the Committee intends that at any time after the BVA has issued a final decision—that is, its first decision on the merits, as distinguished from subsequent decisions rendered after a reopening—the claimant shall have the option of retaining an attorney, under fee limitations far less restrictive than the existing $10 limitation, to proceed further before the VA if the claimant can demonstrate either that there is new and material evidence that was not considered in the earlier adjudication of the claim (in which event the reopening of the claim would be mandatory once the existence of such evidence is established), or that there is other good cause to reopen (in which case the reopening would be discretionary). This provision is the result of a balancing of two important considerations: On the one hand, the

Committee's wish to preserve, to as great an extent as possible, the present system of claims adjudication within the VA, relying primarily on representation by service officers of the veterans' organizations and with minimal attorney involvement; and, on the other hand, the appropriateness of permitting the attorney, whose job will be to present the case on appeal to the district court, to have some meaningful opportunity to shape the administrative record on which he or she will be arguing.

The formula proposed in the Committee bill for approval of fees for claims resolved in the VA after the $10 limit is lifted is similar to that provided for in section 206(a) of the Social Security Act (42 U.S.C. 406(a)), with the one significant difference that, in addition to the contingent-fee percentage amount authorized under the Social Security Act, the proposal in the Committee bill incorporates a separate dollar maximum of $500 as an alternative to the percentage figure. This difference is incorporated because, in many VA benefit cases, the relief sought, in terms of the dollar amount of past-due benefits at stake, may be quite small or even nonexistent (as in a case establishing a service-connected disability with a 10- or zero-percent rating) while still being quite significant to the claimant in terms of eligibility for VA medical care and related service-connected benefits under chapter 17 of title 38.

The $500 limit provided for in the Committee bill would be subject to being increased in two different ways. First, the Administrator might, by administrative action, raise it in future years in response to changed economic conditions. The Committee anticipates that the Administrator would use great care in the exercise of this authority.

The second way in which the $500 limit might be increased would be in unusual cases that require extraordinary effort and time on the part of the attorney. The Committee expects that occasions for use of this authority would be extremely rare. An approval of a fixed fee award above $500 should occur only when the Administrator is persuaded that the attorney, due to the complexity of the case, was required to expend such time and effort that the $500 limitation is plainly inadequate. In making such a determination, the Committee expects that the Administrator would remain mindful that the claimant and the attorney negotiated an agreement with presumed awareness of the fee limitation and that, at that time, the attorney had an opportunity to evaluate the claim and determine if he or she wished to pursue it. Clearly, this authority in the Committee bill should not be used to relieve an attorney of the consequences of an ill-advised decision to devote great amounts of time to a poorly-founded claim or any aspect thereof. Further, the Committee does not believe that this extraordinary authority would be appropriately applied to compensate an attorney, who, because of an unfamiliarity with VA proceedings, the provisions of title 38, or the regulations issued hereunder, devotes a great number of hours to what is otherwise an ordinary claim for benefits, primarily to make up for a lack of a basic understanding of the applicable law.

The Committee emphasizes, with respect to the provisions of the Committee bill applying to attorneys' fees that are to be paid by or on behalf of the claimant to the attorney, that these fees are subject

to the process of arms-length negotiation between the attorney and the client and may be presumed to have been freely negotiated. Thus, the Committee believes that minimal governmental supervision of the reasonableness of the fees is appropriate. Accordingly, under the Committee bill, the Administrator's role with respect to attorneys' fees is limited to approving—but not determining the amount of—a reasonable fee. The Committee does not believe that there will be a need for judicial review of fees that are so negotiated and are in compliance with the various provisions of the Committee bill limiting attorneys' fees and hence has not provided for any judicial review of the fee amount approved by the Administrator for representation before the agency. To the extent that disputes between attorneys and clients do arise with regard to issues other than compliance with the statutory fee limitations, the Committee expects that state and local bar association disciplinary mechanisms should prove adequate for the resolution of such disputes.

Fee Approved for Attorney Representation in Court

For claims cases appealed to court, the Committee bill provides for court approval of a reasonable fee, subject to specific limitations in particular types of cases. First, if an attorney and claimant have entered into a contingent-fee agreement, the same limitations would apply as in cases resolved before the VA, that is, 25 per centum of any past-due benefits awarded.

In the event that a case appealed to court is resolved in a manner unfavorable to a claimant, the court's authority to approve a fee would be limited to a maximum dollar amount of $750. The Committee bill also includes a direction to the reviewing court to take into consideration, in determining the amount to be approved in such a case, the extent to which the attorney could have predicted the unfavorable result at the time the appeal was taken. This specific direction is designed to stress to reviewing courts that the $750 fee allowable under this section is not to be regarded as the amount to be approved automatically but rather that the court should act to discourage attorney representation in cases lacking in any significant merit by approving fee amounts at lower levels in such cases.

In cases appealed to court when the matter is resolved in a manner favorable to the claimant, which is defined in a proposed new subsection (g) of present section 3404 to include the granting of all or any part of the relief sought, the Committee bill would authorize court approval of a reasonable fee with no other restriction. It is the Committee's intention, by this formulation, to allow courts to exercise their expertise in evaluating, under standards prevailing in the various circuits of the Federal judicial system for the determination of a reasonable attorneys' fee under other Federal laws, such as section 1988 of title 42, United States Code, the difficulty of the case and the attorneys' performance in order to arrive at a reasonable fee.

Punitive Award of Attorneys' Fees

The Committee bill includes a provision whereby a court could, as an extraordinary remedy in a matter involving a claim for benefits

appealed to court, award a claimant, who has prevailed in court, a reasonable attorneys' fees to be paid by the VA as part of the court's award of costs following judgment. This authority is intended to be used very sparingly—only in situations where the reviewing court is persuaded that the claimant clearly should have prevailed when the matter was before the agency and that the only necessity for having to seek court review and thus incur attorneys' fee costs was patently unwarranted action on the part of the VA in its consideration of the claim.

This provision is derived from language used in the Equal Access to Justice Act, title II of Public Law 96–481, and is intended to provide the same standard for punitive award of attorneys' fees as is set forth in section 204 of that Act (codified at section 2412(d)(1)(A) of title 28, United States Code). The Committee notes, however, that this provision of the Equal Access to Justice Act is subject to a sunset provision effective October 1, 1984; the parallel authority provided in the Committee bill is not subject to such a termination and thus would continue in effect without regard to that sunset provision.

Ancillary Attorneys' Fees Provisions

Title IV of the Committee bill contains two other provisions relating to the approval of attorneys' fees which are intended to clarify the application of the new fee-approval provisions. The first such provision would provide that, to the extent past-due benefits are awarded in a claim, by either the Administrator or a court, the Administrator is required to direct payment of the approved fee to the attorney out of the past-due benefits. This authority, similar to that in section 206 of the Social Security Act (42 U.S.C. 406), would not be applicable if no past-due benefits were awarded so that, even if the resolution of the claim resulted in a claimant qualifying for a monthly payment from the VA for, for example, service-connected disability compensation, the Administrator would not be authorized to arrange for any portion of such future benefits to be paid to the attorney. Thus, in a case with no award of past-due benefits, the claimant and the attorney would have to make their own arrangements for payment of any fee that is approved.

The second ancillary provision in title IV would specify that the provisions proposed in the title are applicable only to cases involving claims for VA benefits and that where no claim for benefits is involved (for example, in constitutional challenges to regulations, Freedom of Information Act cases, and other nonclaim cases), the individual and the attorney would not be restricted by the provisions proposed by the title.

TITLE V: MERIT PAY SYSTEM EXCLUSION FOR BOARD OF VETERANS' APPEALS MEMBERS

Section 501 of the Committee bill would amend present section 4001(b), relating to appointment by the Administrator of members of the Board of Veterans' Appeals, to provide that members of the Board shall not be subject to the Merit Pay and Performance Appraisal Systems provisions of the Civil Service Reform Act of 1978 as

set forth in section 5402 of title 5, United States Code. The exclusion contained in section 501 is not made applicable to the Chairman and Vice Chairman of the Board, inasmuch as those positions are within the Senior Executive Service and thus are not subject to the Merit Pay System.

Merit Pay is a system of financial incentives based on periodic performance evaluations. The exclusion of Board members from this system is designed to recognize the important adjudicative nature of the Board, and to ensure that the Board's decisional independence will not be compromised by pressures originating with administrative officials not directly associated with the adjudicative process itself. The Committee acknowledges the risk, articulated in the testimony of Board members Roger K. Bauer and Daniel J. B. Bierman, that these periodic performance evaluations might "cast a subtle chill over the entire decisional process." The Committee recognizes that similar protections are already afforded to Administrative Law Judges under section 5372 of title 5, United States Code.

This issue was addressed in considerable detail in the Committee's July 15, 1981, hearing on S. 349 and related issues. No testimony was offered in opposition to the exclusion contained in this section.

TITLE VI: EFFECTIVE DATES

Section 601 of the Committee bill provides for a 180-day delayed effective date (following the date of enactment) in order to provide the VA with a full opportunity to make necessary adjustments in its internal procedures in preparation for full implementation of this legislation. Under section 602, the judicial review provisions of the Committee bill would be effective only with respect to BVA decisions rendered on or after April 1, 1982. Under S. 349 as introduced, judicial review would have been available with respect to BVA decisions rendered on or after January 1, 1977—the date originally proposed in S. 330. This change is made in recognition of the VA's estimate that this retroactivity provision would have a total cost associated with it in excess of $13.5 million.

Cost Estimate

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee, based on information supplied by the Congressional Budget Office, estimates that the costs resulting from the enactment of the Committee bill during the first 5 years following enactment would be $4.2 million in fiscal year 1983; $7.1 million in fiscal year 1984; $11.7 million in fiscal year 1985; $14.2 million in fiscal year 1986; and $14.7 million in fiscal year 1987. A detailed breakdown of the costs, as estimated by CBO, over the 5-year period follows:

CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

May 7, 1982

1. BILL NUMBER: S. 349

2. BILL TITLE:

Veterans Administration Adjudication Procedure and Judicial Review Act.

3. BILL STATUS:

As ordered reported by the Senate Committee on Veterans' Affairs, April 28, 1982.

4. BILL PURPOSE:

To establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans Administration (VA); to apply the provisions of section 553 of title 5, U.S.C., to rulemaking procedures of the VA; to provide for judicial review of certain final decisions of the Administrator of Veterans Affairs; and for other purposes.

5. COST ESTIMATE:

(by fiscal year, in millions of dollars)

	1983	1984	1985	1986	1987
Function 700 Impact					
Estimated					
Authorization Level	3.7	4.6	6.9	7.9	8.3
Estimated Outlays	3.7	4.4	6.8	7.8	8.3
Function 750 Impact					
Estimated					
Authorization Level	0.5	2.7	4.9	6.4	6.4
Estimated Outlays	0.5	2.7	4.9	6.4	6.4
Net Budgetary Impact					
Estimated					
Authorization Level	4.2	7.3	11.8	14.3	14.7
Estimated Outlays	4.2	7.1	11.7	14.2	14.7

The costs of this bill fall within function 700.

6. BASIS FOR ESTIMATE:

The following section-by-section analysis addresses only those sections that would be expected to have a budgetary impact. All sections are assumed to be effective January 1, 1983.

Section 103: This section would expand the maximum number of members on the Board of Veterans Appeals (BVA) from 50 to 65 members.

(by fiscal year, in millions of dollars)

	1983	1984	1985	1986	1987
Estimated Authorization Level	0.9	2.5	3.8	4.6	4.8
Estimated Outlays	0.9	2.4	3.7	4.5	4.8

The above estimate assumes the 15 new members of the BVA and the 90 additional full-time equivalent employees (FTEE) in advisory and administrative support staff would be hired over a three-year period from January 1983 through fiscal year 1985. Based on the current ratio of staff to Board members, it was further assumed that an additional 35 attorney advisers and 55 administrative positions would be needed to support the expanded membership of the Board. The average salary level for attorney positions was assumed to be GS-13/2 and for administrative positions, GS-5. Salaries were inflated for projected federal pay raises of 5 percent a year, and an additional 1 percent per year for merit pay increases. Non-recurring costs were assumed to equal $1,000 per FTEE for furniture and office equipment in fiscal year 1982 dollars. This was inflated for fiscal year 1983-1985 by the CBO projection of increases in the cost of federal purchases of nondefense durable goods. Recurring operating costs were assumed to be similar to current operating costs per FTEE and were inflated by the CBO composite index for federal purchases of nondefense goods and services.

Section 108: This section would provide that, when there is substantial disagreement between the opinions of two physicians in an appeal case, the claimant can request that an independent medical opinion be obtained at VA expense.

It is not expected that a sufficient number of cases would require an independent medical opinion for this provision to result in a significant cost.

Section 110: This section would authorize the Administrator of Veterans Affairs to conduct a study in order to evaluate the feasibility and desirability of two alternative methods of resolving disputed claims for benefits. One method would involve an intermediate-level appeal hearing before a panel of three members of VA's adjudication staff who have had no prior involvement with the case. The other approach to be tested would entail BVA panels conducting formal recorded hearings in certain regional offices on at least a quarterly basis.

Since each test program would involve only three regional offices, it is expected that VA should be able to conduct the study with few additions to existing personnel. Some travel expense would be incurred by BVA; but this, combined with any potential personnel costs, should not be significant.

Title III: This title would authorize access to the federal court system for veterans and their survivors to appeal disputed decisions of the Board of Veterans Appeals rendered on or after April 1, 1982.

(by fiscal year, in millions of dollars)

	1983	1984	1985	1986	1987
Function 700 Impact					
Estimated					
Authorization Level	2.8	2.1	3.1	3.3	3.5
Estimated Outlays	2.8	2.0	3.1	3.3	3.5
Function 750 Impact					
Estimated					
Authorization Level	0.5	2.7	4.9	6.4	6.4
Estimated Outlays	0.5	2.7	4.9	6.4	6.4

This provision would impact on the workload of the Board of Veterans Appeals (BVA), the Department of Veterans Benefits (DVB), and the Office of the General Counsel in VA and would add to the caseload of federal district and circuit courts. The increase in the staff of BVA provided by section 103 of this bill should be sufficient to accomodate the growth in their workload. The additions to DVB staffing necessary to handle the processing of remands from the courts would be small, only about 10 FTEE, at a little more than $300,000 a year. The General Counsel's office would be affected more than any other in VA by this provision. Since this staff would be required to litigate the appeals, it is estimated that an additional 82 FTEE would be needed at a cost of nearly $3 million. The Department of Justice has estimated that an additional eight district court judges and one circuit court judge would be needed to handle the influx of veterans' benefit cases into the federal court system. Although this bill does not authorize the establishment of any new judgeships, the estimate assumes that such authorization would be forthcoming.

The above estimates are based on the following assumptions and methodologies:

- o It was assumed, based on a BVA estimate, that the rate at which cases are denied by BVA will drop from its present level of 70 percent to about 60 percent with the use of independent medical opinions (as authorized by section 108) and precedent decisions.

- o It was assumed that 15 percent of the cases denied by BVA would be appealed. The Social Security Administration (SSA) has experienced an appeal rate of approximately 20 percent of denials. It is expected that VA claims would show a lower appeal rate, because, unlike Social Security, it is current practice at VA (and it would be mandated by section 101) to resolve issues in which the evidence is equally balanced in favor of the claimant.

- o It was assumed that 30 percent of the appealed cases would be remanded for further action and development, based on SSA experience.

- o Although all provisions of the title were assumed to be effective on January 1, 1983, full steady-state operation and staffing levels were not assumed to be achieved until fiscal year 1986.

- o All personnel costs were inflated by the CBO projection of federal pay raises.

- o Non-salary personnel benefit costs were assumed to be 30 percent of salary costs.

- o All other operating costs were increased in the outyears by the appropriate CBO projection of inflation.

It should be noted that the expansion of the appeals process for VA decisions would probably result in some new awards that would not otherwise have been approved. While it is not possible to estimate with any precision the benefit cost of the new awards, it is not expected to be significant.

7. ESTIMATE COMPARISON:

On February 16, 1982 VA prepared the following estimate of an earlier version of S. 349:

(by fiscal year, in millions of dollars)

	1982	1983	1984	1985	1986
Costs	9.5	8.5	10.6	9.6	9.7

The version of the bill for which the VA estimate was prepared authorized judicial review of all cases denied by the Board of Veterans Appeals since January 1, 1977. The version of the bill reported by the Committee on April 28, 1982 would only allow judicial review for cases denied on or after April 1, 1982. The very high cost in the first three years of the VA estimate reflects the requirements for processing the appeals from the retroactive cases. Other major differences in the estimates are as follows:

- The CBO estimate of the cost of expanding the BVA by 15 members assumes that support staff levels for the new members would be similar to those existing for current members, based on information from the staff of the Senate Veterans Affairs Committee regarding the legislative intent of Section 103. The VA estimate reflects considerably greater expansion in support staff.

- The VA estimate of the increase in the workload of the General Counsel's office assumes a denial rate in BVA decisions of 72 percent. BVA asserts, however, that the current denial rate is 70 percent and would decrease to 60 percent under the provisions of S. 349. The lower denial rate will result in a lower number of appeals and, therefore, a smaller increase in the workload of the General Counsel's staff.

- The VA estimate of personnel costs reflects the federal salary scale as of October 1, 1980 and is not inflated in the outyears for future federal pay raises.

- The VA cost estimate of the test program involving intermediate-level appeal hearings assumes that 4,500 cases a year would request such a hearing. Since only 35,000 cases a year are appealed to BVA, it seems highly unlikely 4,500 requests for intermediate-level hearings would be generated in the three regional offices to which the test program is limited.

8. PREVIOUS CBO ESTIMATE: None.

9. ESTIMATE PREPARED BY: K.W. Shepherd (226-2820).

10. ESTIMATE APPROVED BY:

C.G. Nuckols for James L. Blum
Assistant Director for
Budget Analysis Division

Regulatory Impact Statement

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee on Veterans' Affairs has made an evaluation of the regulatory impact which would be incurred in carrying out the Committee bill. The results of that evaluation are described below.

S. 349 as reported has six titles: I—Adjudication procedures; II—Veterans' Administration rule making; III—Judicial review; IV—Attorneys' fees; V—Merit pay system exclusion for Board of Veterans' Appeals members; and VI—Effective dates.

A. *Estimates of the number of individuals and businesses who would be regulated, and a determination of the groups and classes of such individuals and businesses:*

Title I.—Title I would codify internal adjudications procedures within the VA for the purpose of providing statutory procedural protections for claimants while maintaining the informality that characterizes VA proceedings at present; would provide for the development of an administrative record in claims adjudications that will enable a reviewing court to understand and evaluate the proceedings in a particular case; and would enhance the agency's ability to carry out its mission after provision is made for judicial review of agency decisions. This title will not result in any regulation of individuals or businesses.

Title II.—Title II would require the VA's rulemaking procedures to be in accord with the relevant provisions in the Administrative Procedure Act. This means that the VA regulations would be required to be promulgated in accordance with the requirements of section 553 of title 5, United States Code, which includes requirements relating to public notice and opportunity for comment in the rulemaking process. The VA states that it has been in voluntary compliance with these requirements for a number of years. This title will not result in the regulation of any individuals or businesses.

Title III.—Title III provides access to the Federal court system for review of VA decisions. No individuals or businesses will be regulated.

Title IV.—Title IV revises the present limitation of $10 contained in title 38, United States Code, on the amount an attorney may receive for representing an individual with a claim for benefits under laws administered by the VA by providing for the approval by the Administrator of limited attorneys' fees, for representation of individuals before the VA, and for court approval of fees for the representation of such claimants in court proceedings authorized by the new judicial review provisions added to title 38 by title III of the Committee bill. Attorney representation before the VA would be permitted only after a claim had been denied by the BVA; at that point, it would be a matter of right if there were new and material evidence presented in support of the claim, and a matter of discretion with the Administrator if the claimant were to demonstrate good cause for the reopening of the claim. It is not possible to predict with any certainty the numbers of claimants who will retain attorneys to represent them in such subsequent proceedings before the BVA or in the Federal courts. In fiscal year 1981, 33,461 appeals were disposed of by the

BVA, and approximately 12.4 percent of that number were disposed of favorably to the claimant; thus, it is expected that no more than approximately 30,000 claimants would be eligible to retain attorneys in any given year. However, the Committee anticipates that the system of veteran service officer representation (free representation provided by employees of various veterans' groups and other organizations) will remain a very strong and vital force and, as a result, most claimants will not retain private attorneys in VA proceedings.

Title V.—Title V exempts the members of the BVA from the merit pay system of the Civil Service Reform Act of 1978. No individuals or businesses will be regulated.

Title VI.—Title VI contains an effective date provision and authorizes court review of final VA decisions rendered on or after April 1, 1982. Nothing in this title will result in the regulation of any individuals or businesses.

B. *Determination of the economic impact of such regulations on individuals, consumers and businesses affected:*

Titles I through VI.—No significant economic impact on claimants before the VA (the "consumer" of VA adjudication procedures and judicial review) is expected to result from regulations under these titles.

C. *Determination of the impact on the personal privacy of individuals affected:*

Title I.—There would be no significant impact on the personal privacy of individuals affected by this title beyond any loss of privacy ordinarily entailed in claiming VA benefits.

Title II.—This title would have no impact on the personal privacy of any individuals.

Title III.—There would be no significant impact on the personal privacy of individuals affected by this title beyond any loss of privacy ordinarily entailed in pursuing a civil remedy in Federal court for the denial of a Federal benefit.

Title IV.—There would be no significant impact on the personal privacy of individuals affected by this title. Individual attorneys would be required to provide justification for fees claimed in conjunction with representing individuals, but such a requirement is in accord with the normal practice in cases in which agency or court approval of a fee award is required.

Titles V and VI.—There would be no significant impact on the personal privacy of individuals affected by these titles.

D. *Determination of the amount of additional paperwork that will result from regulations to be promulgated under the bill:*

Title I.—Regulations to be promulgated under this title will generate little or no additional paperwork beyond that ordinarily involved in VA claims adjudications processes. However, additional paperwork will be required of the VA in the form of an annual report on certain aspects of Board of Veterans' Appeals operations from the Chairman of the Board of the Congress on October 1, 1983, and annually thereafter; a report following a discretionary study of alternative methods of speeding claims resolutions at locations convenient to claimants' residences; and in the form of ruling on requests for additional independent medical opinions and the opinions themselves.

Title II.—Since the VA has generally been in voluntary compliance for a number of years with the procedures added to title 38 by this title, mandating such compliance should result in no additional paperwork.

Title III.—The authorizations in this title for judicial review in Federal courts should not result in the promulgation of any additional regulations. However, it is anticipated that this access to court review will result in a significant increase in internal VA paperwork as files are prepared for courts and cases are defended in court.

Title IV.—Pursuant to this title, the Administrator will be required to either approve or deny attorneys' fees for representation of claimants before the VA, resulting in additional paperwork in the form of applications from attorneys and decisions thereon regarding approval of fees. Although all attorneys who represent claimants in matters resolved within the VA will submit such paperwork, it is not anticipated that this requirement will constitute an undue burden on any individual attorney, nor should the paperwork result in significant management problems for the agency.

Title V.—It is not anticipated that any additional paperwork will be generated by this title. To the contrary, it is anticipated that some reduction in paperwork will result from the exclusion of BVA members from the merit pay system of the Civil Service Reform Act of 1978.

Title VI.—It is not anticipated that any regulations will be promulgated under this title.

Section 1

SECTION-BY-SECTION ANALYSIS OF S. 349 AS REPORTED

Subsection (a) of section 1 provides that this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

Subsection (b) of section 1 provides that, except when otherwise expressly provided, reference to a section or other provision shall be considered to be made to a section or other provisions of title 38, United States Code, relating to veterans' benefits.

TITLE I—ADJUDICATION PROCEDURES

Section 101

Subsection (a) of section 101 would amend chapter 51 of title 38, United States Code, relating to applications for, the effective dates of, and the method of payment of veterans' benefits, to add a new section 3007 codifying, for VA adjudication purposes, the burden of proof and reasonable doubt standards currently provided for by VA regulation (38 CFR 3.102) and the requirement, also in VA regulations, that the VA assist a claimant in developing facts in connection with a claim (38 CFR 3.103). These provisions would be codified in order to ensure that the VA's present practices of making every reasonable effort to assist a claimant and construing the evidence favorably to the claimant are not abandoned in response to the provisions of title

III of the bill proposing to amend title 38 to authorize court review. The new section 3007 would provide as follows:

New section 3007.—Burden of proof; benefit of the doubt

Subsection (a) of new section 3007: Would provide that, except when otherwise provided by the Administrator in accordance with provisions of title 38, a claimant would have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that a claim is well grounded and would provide that the Administrator shall assist a claimant in developing pertinent facts. Thus, as presently provided for in VA regulations (38 CFR 3.102), the initial burden of going forward with evidence to establish all elements of a claim would be on the claimant. This subsection would not affect existing statutory or regulatory procedures that specify different procedures relating to burden of proof (for example, the statutory presumptions relating to certain diseases in section 312 of title 38, United States Code, pursuant to which certain such diseases are considered service connected without a showing that the particular disease existed during active duty service if it became manifest within a specified period after the individual's discharge from such service). In addition, this subsection would codify the obligation of the VA (presently imposed by regulation set forth at 38 CFR 3.103) to provide complete assistance to the veteran or other claimant in the development of a claim.

Subsection (b) of new section 3007: Would provide, without shifting the burden specified in subsection (a) of this section, that, if, after a review of all of the evidence in a case, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the claim, the VA is to give the claimant the benefit of the doubt on each such issue, thus resolving the issue in favor of the claimant. This provision is derived from an existing VA regulation (38 CFR 3.102) but the rules are simplified and the phrase "benefit of the doubt," is used in lieu of the phrase "reasonable doubt" in order to avoid confusion with the meaning of the latter phrase in the criminal law context.

Paragraph (1) of subsection (b) of section 101 would amend the table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title, relating to general administrative provisions, to strike, in the item relating to chapter 51, "Applications" and insert in lieu thereof "Claims" in order to reflect the change made in that chapter heading by paragraph (2) of this subsection.

Paragraph (2) of subsection (b) of section 101 would amend the heading of chapter 51 to read "Chapter 51—Claims, Effective Dates, and Payments" in lieu of "Applications, Effective Dates, and Payments" in order to indicate more accurately the subject matter of that chapter.

Paragraph (1) of subsection (c) of section 101 would amend the table of sections at the beginning of chapter 51 of title 38, United States Code, relating to claims, effective dates, and payments, to strike, in the item relating to subchapter I, "Applications" and insert in lieu thereof "Claims" in order to reflect the change made in that subchapter heading by paragraph (2) of this subsection.

Paragraph (2) of subsection (c) of section 101 would amend the heading of subchapter I of chapter 51 to read "Subchapter I—Claims" in lieu of "Subchapter I—Applications" in order to indicate more accurately the subject matter of that subchapter.

Subsection (d) of section 101 would amend the table of sections at the beginning of chapter 51 of title 38, United States Code, relating to claims, effective dates, and payments to reflect the addition of the new section 3007 proposed to be made by subsection (a) of this section of the Committee bill.

Section 101—Cost.—Enactment of the provisions of section 101 are estimated to entail no costs.

Section 102

Would amend present section 3311, relating to the Administrator's authority to issue subpenas, to provide that subpenas authorized under that section may be served either by personal delivery to the person named or by registered or certified mail. This provision is derived from (and intended to have the same substantive effect as) section 205 (d) of the Social Security Act (SSA) (42 U.S.C. 405(d)).

Section 102—Cost.—Enactment of this provision would entail no costs.

Section 103

Clause (1) of section 103 would amend subsection (a) of present section 4001, relating to the composition of the Board of Veterans' Appeals, to increase from 50 to 65 the limitation on the size of the Board of Veterans' Appeals membership in order both to ease existing strains on the BVA's docket and to enhance the Board's ability to handle the increased workload, in the form of longer, more detailed opinions and court-ordered remands for further development of the record in individual cases that may be generated by the judicial review of VA decisions (as would be authorized by the amendments proposed to be made by title III of the Committee bill) is expected to generate; to make a technical amendment in the statutory description of members of the Board (striking "associate" in the description of members of the Board based on the VA's explanation that there is no difference between "members" and "associate members"); and to add language indicating that the Board should dispose of appeals properly before it "in a timely manner."

Clause (2) of section 103 would further amend present section 4001 by adding a new subsection (c), as follows:

New subsection (c): Would require the Chairman of the Board of Veterans' Appeals to submit a report to the appropriate committees of Congress, not later than October 1, 1983, and annually thereafter, on the Board's activity for the prior fiscal year, together with a projection for the fiscal year in which the report is submitted and the subsequent fiscal year. The report must include detailed information on the Board's workload, including a report on the average length of time cases were before the Board, and an evaluation of the Board's ability, based on existing and projected personnel levels, to dispose of cases before it "in a timely manner" as provided in the amendment to subsection (a) of present section 4001 proposed to be made by clause (1) of section 103 of the Committee bill.

Section 103—Cost.—Enactment of the provisions of section 103 of the Committee bill is estimated to cost $0.9 million in fiscal year 1983.

Section 104

Would amend present section 4002, relating to the assignment of members of the Board of Veterans' Appeals, to make a technical amendment in the statutory description of members of the Board (that is, to delete "associate" from the description of members of the Board for the reason set forth in the analysis of clause (1) of section 103 of the Committee bill, above).

Section 104—Cost.—Enactment of this provision would entail no costs.

Section 105

Would amend subsections (a) and (b) of present section 4003, relating to determinations by the Board of Veterans' Appeals, to require that the Board, before reversing its prior decision in an individual case on the basis of additional official information from the service department concerned, provide the claimant with notice of such additional information together with an opportunity to be heard in connection with such information.

Section 105—Cost.—Enactment of the provisions of section 105 are estimated to entail no costs.

Section 106

Would amend present section 4004, relating to the jurisdiction of the Board of Veterans' Appeals, to codify a number of existing practices of the Board and to clarify other practices and procedures in conjunction with court review of VA decisions, as would be authorized by the amendments proposed to be made by title III of the Committee bill.

Clause (1) of section 106 would amend subsection (a) of present section 4004, relating to a claimant's right to one appeal, which is to be decided by the Board, to provide claimants who have appeals before the Board with the express statutory right to an opportunity for a hearing before the Board, and to require that Board decisions be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law. These changes codify the general practice now followed by the Board, based on the provisions of present section 4005(a) as to a right to hearing (presently set forth in 38 CFR 19.133(a)) and present section 4005(d)(5) as to the record. This latter provision is proposed to be deleted by section 107 of the Committee bill.

Clause (2) of section 106 would amend subsection (b) of present section 4004, relating to the reopening of Board decisions, to eliminate the requirement that new and material evidence sufficient for a reopening of a previously disallowed claim be in the form of "official reports from the proper service department" (this change is consistent with the Board's current practice of allowing previously denied claims to be reopened on the basis of new and material evidence from any source, although the applicable regulation, 38 CFR 19.155, does not clearly articulate this process); to impose a requirement—in lieu of an authorization—of reopening and reconsideration of a claim

whenever new and material evidence is secured; to provide for the discretionary reopening and reconsideration of a claim where good cause for reopening is shown; to specify that, with respect to the reopening of claims, the Board may return the claim to the agency of original jurisdiction for action (either on the question of whether the claim is to be reopened or on the merits of the claim, or both); and to specify that a judicial decision (pursuant to the new judicial review provisions added by the amendments made by title III of the Committee bill) upholding, in whole or part, a prior decision of the Board disallowing a claim shall not diminish the Board's authorities to reopen (that is, both the mandatory reopening for new and material evidence, and the discretionary reopening for good cause shown) a claim. The latter provision is designed specifically to make it clear that nothing in the new provisions authorizing judicial review is intended to allow the doctrine of *res judicata* to affect the VA's "open file" system of claims adjudication. Thus, the fact of an adverse court ruling on a claim in no way is intended to preclude a veteran or other claimant from continuing to pursue the claim by gathering and offering new and material evidence sufficient to reopen the matter.

Clause (3) of section 106 would amend subsection (d) of present section 4004, relating to the form of Board decisions, to require expressly that Board decisions state separately findings of fact and conclusions of law on each material issue in the case and that the Board mail a copy of its final decision to the last known address of the claimant and of the claimant's authorized representative, if any. These requirements would codify current Board practices not expressly provided for in regulation, and would provide a statutory basis for procedures that would precede and should facilitate court review of a matter appealed to court. The date on which the decision is mailed to the last known address of the claimant and the claimant's authorized representative would mark the first day of the 180-day period following a Board decision in which a claimant would be permitted to file a civil action under new section 4025 of title 38 (as added by subsection (a) of section 302 of the Committee bill). The provision relating to the contents of the Board's decision, which is derived from the Administrative Procedure Act (APA) (5 U.S.C. 557(c)), is intended to help ensure that decisions of the Board are sufficiently explicit and detailed so as to enable the claimant to understand clearly the basis of the Board's action and, in the case of an appeal to a court, to enable the claimant to state specific grounds for appealing the decision; and to provide the reviewing court with a basis to understand and interpret the decision of the Board.

Section 106—Cost.—Enactment of the provisions of section 106 are estimated to entail no costs.

Section 107

Would amend present section 4005(d)(5), relating to the Board's disposition of appeals, to delete the requirement that the Board base its decision on the entire record, inasmuch as because that requirement would be included in present section 4004(a) by an amendment proposed to be made by section 106(1) of the Committee bill.

Section 107—Cost.—Enactment of this provision would entail no costs.

Section 108

Would amend present section 4009, relating to the obtaining of independent medical opinions by the Board in medically complex or controverted cases, to add a new subsection (c), as follows:

New subsection (c): Would provide the claimant with the right to request an independent medical opinion when, in a case before the Board, there is a substantial disagreement between the substantiated findings or opinions of two physicians with respect to a material issue in the case and the Board cannot resolve the disagreement in any other way (for example, by interrogatories to one or both physicians, probing the basis for such physician's findings or opinion). In the case of a denial of such a request, the Board would be required to provide the claimant and the claimant's authorized representative, if any, with a statement of its reasons for denying such request, but the Board's decision on such a request would be committed to agency discretion and thus would be final and not subject to judicial review.

Section 108—Cost.—Enactment of this section is estimated to entail no significant costs.

Section 109

Would amend chapter 71 of title 38, United States Code, relating to the Board of Veterans' Appeals, by adding two new sections, one establishing certain procedures to be followed in adjudicatory proceedings within the VA (largely derived from provisions of the APA (5 U.S.C. 554, 555, and 556)) and the other setting forth requirements for the Administrator to apprise claimants of their procedural rights before the VA.

Subsection (a) of section 109 would amend chapter 71 by adding two new sections, as follows:

New section 4010.—Adjudication procedures

Subsection (a) of new section 4010: Would authorize the Administrator, in any hearing, investigation, or proceeding in the VA, in connection with a claim for benefits under laws administered by the VA, to administer oaths, examine witnesses, and take evidence. The statutory granting of this fundamental authority codifies existing VA practice, derived, insofar as subpenaed witnesses are concerned, from present section 3311 though not required by a specific regulation; it is based on an APA provision (5 U.S.C. 556(c)) and is similar to SSA section 205(b) (42 U.S.C. 405 (b)).

Subsection (b) of new section 4010: Would provide for the admission of any evidence in VA proceedings, including proceedings before the Board, even evidence that would be inadmissible under the rules of evidence applicable in judicial proceedings except that the Administrator would be authorized to prescribe regulations allowing exclusion of irrelevant, immaterial or unduly repetitious evidence. This provision, which is based on similar APA (5 U.S.C. 556(d)) and SSA provisions (42 U.S.C. 405(b)), generally codifies the existing VA regulation, 38 CFR 19.133(c).

Paragraph (1) of subsection (c) of new section 4010: Would specify certain procedural rights of claimants in proceedings before the Board of Veterans' Appeals, the first four of which are derived from the APA (5 U.S.C. 556(d)). Thus, the provisions of paragraph (1) of

subsection (c) of this new section would give the claimant or the claimant's authorized representative the right to:

- Examine the contents of the case files and all documents and records that the VA plans to use in the proceeding and, on the payment of a fee, prescribed pursuant to present section 3302(b), not to exceed the direct cost of duplicating the materials, the right to obtain copies of all such materials.
- Present witnesses and evidence restricted only by regulations of the Administrator relating to irrelevant, immaterial, or unduly repetitious evidence as authorized by proposed subsection (b) of this section.
- Make arguments to the Board, both orally and in the form of a written brief or similar document, on both substantive and procedural issues.
- Submit rebuttal evidence.
- Present medical opinions as part of the case, and request an independent medical opinion pursuant to new subsection (c) to present section 4009 (as proposed to be added by section 108 of the Committee bill).
- Serve on any person written interrogatories that would have to be answered in writing separately and under oath unless the person served makes an objection to the Administrator. (Paragraphs (3) and (4) of this subsection, discussed below, provide specific procedures for objection to and enforcement of such interrogatories.)

Paragraph (2) of subsection (c) of new section 4010: Would provide that the fee provided for in clause (1)(A) of this subsection for the reproduction of the contents of case files and all materials that the VA plans to use in the proceeding may be waived, pursuant to regulations that the Administrator shall prescribe, either on the basis of a party's inability to pay or for other good cause.

Paragraph (3) of subsection (c) of new section 4010: Would provide that, in the event an individual served with interrogatories under paragraph (1) of this subsection objects to some or all of the interrogatories, the Administrator would be required, pursuant to regulations which the Administrator must prescribe establishing standards consistent with standards for protective orders applicable in United States District Courts (currently Rule 26(c) of the Rules of Civil Procedure for United States District Courts), to evaluate the objection and either order the interrogatories to be answered as served or as modified by the Administrator, or order that the interrogatories need not be answered. In this manner, the Administrator would be available to protect against the use of interrogatories to harass or unduly burden the person served with the interrogatories.

Paragraph (4) of subsection (c) of new subsection 4010: Would provide that, if a person served with interrogatories under paragraph (1) of this subsection fails to answer or to provide responsive answers and the party serving the interrogatories shows the general relevance and reasonable scope of the evidence sought, the Administrator is to issue a subpena pursuant to present section 3311 of title 38 with enforcement pursuant to present section 3313 of title 38, United States Code, to require the person served with the interrogatories to appear at a deposition on written questions at a location within 100 miles of the witness' residence or place of work. This procedure for enforcing

the interrogatories, together with the check provided by the Administrator's evaluation of any objection, is designed to prevent abuse of this discovery tool while providing a claimant with a means of obtaining relevant evidence that would otherwise be unavailable to the claimant. The provisions relating to the use of interrogatories are proposed in lieu of allowing a claimant to subpena a witness to appear at a Board hearing for the purpose of cross-examination by the claimant or the claimant's authorized representative because of concern that such cross-examination would not be consistent with the goal of conducting proceedings by the Board in a nonadversarial fashion.

Subsection (d) of new section 4010: Would provide authority for a hearing officer in any VA proceeding to disqualify himself or herself because of personal bias or other cause and also would provide authority for a party to challenge a hearing officer on such basis. This provision is derived from the APA (5 U.S.C. 556(b)).

Subsection (e) of new section 4010: Would specify that the administrative record in a case would consist of the transcript or recording of testimony and the exhibits, all papers and requests filed in the proceeding, and the decision of the Board; and would require the Administrator, upon payment of a reasonable fee, prescribed pursuant to present section 3302(b) of title 38, for the direct cost of duplicating the contents of the record for the claimant. The duplicating fee would be waivable on the basis of a party's inability to pay or for other good cause shown.

Subsection (f) of new section 4010: Would specify that, notwithstanding any other provision of law, the adjudication and hearing procedures contained in title 38, and in regulations prescribed by the Administrator thereunder are exclusive. This provision is designed to preclude judicial incorporation of other procedures from the Administrative Procedure Act or elsewhere and, thus to ensure that VA procedures remain informal and nonadversarial in nature.

New section 4011.—Notice of procedural rights: Would require the Administrator to provide, at each stage of the proceedings before the VA, notice, in easily understandable language, to a claimant of procedural rights and the procedures available to obtain various opportunities for review. This provision is designed to assure that at each critical juncture in the administrative adjudication/appeals process, the claimant is specifically notified of his or her rights at that level, and of remaining available options; and to assure that, where there are substantial populations of veterans with limited English-language proficiency, this notice is provided in a language other than English, such as Spanish, which is spoken by a significant percentage of the clientele of the particular VA facility.

Subsection (b) of section 109 would amend the table of sections at the beginning of chapter 71 to reflect the addition of new sections 4010 and 4011 proposed to be made by the amendments in subsection (a) of this section of the Committee bill.

Section 109—Cost.—Enactment of the provisions in section 109 is estimated to entail no significant costs.

Section 110

Would authorize the Administrator to conduct a study, commencing not more than one year after the date of enactment of this bill, of al-

ternative methods of providing speedier claims resolution at locations convenient to claimants' residences. The study could include either or both of two alternative procedures: First, in not more than three geographic areas, a procedure utilizing an intermediate review panel of regional office personnel from the Department of Veterans' Benefits, which would conduct a *de novo* review of the claim prior to any appeal to the Board of Veterans' Appeals; and, second, in not more than three other geographic areas, an enhanced schedule of visits by traveling panels of the Board of Veterans' Appeals (on at least a quarterly basis). If such a study were conducted, the Administrator would be required to report to the Congress on the results of the study, including an evaluation of the cost factors associated with each alternative and the impact on the workload of the regional offices involved and the Board of Veterans' Appeals resulting from each alternative, together with any recommendations for administrative or legislative action, or both, as may be indicated by the study.

Section 110—Cost.—Enactment of this provision is estimated to entail no significant costs.

TITLE II—VETERANS' ADMINISTRATION RULE MAKING

Section 201

Subsection (a) of section 201 would amend subchapter II of chapter 3 of title 38, United States Code, relating to various administrative matters pertaining to the Veterans' Administration, by adding a new section 221, as follows:

New section 221.—Rule making: Would provide that, notwithstanding the preclusion in section 553(a)(2) of title 5, United States Code, of matters involving "loans, grants, benefits, or contracts" from Administrative Procedure Act rulemaking procedural requirements, the VA's rulemaking procedures must be in compliance with the provisions of the Administrative Procedure Act section relating to rule making, section 553 of title 5, United States Code. This section would generally codify the current VA regulations, 38 CFR 1.12.

Subsection (b) of section 201 would amend the table of sections at the beginning of chapter 3 of title 38, United States Code, relating to general administrative matters pertaining to the Veterans' Administration, to reflect the addition of the new section 221 proposed to be made by subsection (a) of this section of the Committee bill.

Section 201—Cost.—Enactment of this provision is estimated to entail no costs.

TITLE III—JUDICIAL REVIEW

Section 301

Would amend section 211(a) of title 38, United States Code, relating to decisions by the Administrator, which generally precludes judicial review of decisions of the Administrator in matters relating to claims for benefits under laws administered by the VA, to add to the matters to which such preclusion does not apply, subchapter II of chapter 71, the new judicial review subchapter proposed to be added by section 302 of the Committee bill.

Section 301—Cost.—Enactment of this provision is estimated to entail no costs.

Section 302

Subsection (a) of section 302 would amend chapter 71 of title 38, United States Code, relating to the Board of Veterans' Appeals, to add a new subchapter II, entitled "Judicial Review", which would authorize and prescribe procedures for access to the Federal court system for review of certain VA decisions and would consist of new sections 4025 through 4029, as follows:

New section 4025.—Right of review; commencement of action: Would establish a right of review in Federal court for the review of a case involving a claim for benefits under laws administered by the Veterans' Administration and would set forth procedures related to bringing an action for such review.

Subsection (a) of new section 4025: Would define (1) "final decision of the Administrator", as used in subsection (b) of this new section, to include not only a decision on the merits pursuant to section 4004(a) (as proposed to be amended by section 106 of the Committee bill), but also a refusal to reopen a claim pursuant to section 4004(b) (as proposed to be amended by section 106 of the Committee bill), or a refusal on the basis of nonconformity with present chapter 71 provisions relating to form or manner of appeals actions, pursuant to present section 4008, or on the basis of a lack of timeliness, pursuant to present section 4005, to consider a claim, and (2) "claim for benefits", as used in subsection (b) of this new section and elsewhere in this new judicial review subchapter, to include not only an initial claim filed under present section 3001 of title 38 but also a challenge to a decision reducing, suspending, or terminating a benefit as well as any request by or on behalf of a claimant for reopening, reconsideration, or further consideration of either an initial claim or a challenge to a decision reducing, suspending, or terminating benefits. This definition of "claim for benefits' is intended to remove any possible doubt that the provisions authorizing a right to judicial review apply in cases other than initial claims for benefits.

Subsection (b) of new section 4025: Would provide for court review of a "final decision" (as defined in subsection (a) of this new section) in a matter involving a claim for benefits (also as defined in subsection (a) of this new section) under laws administered by the Veterans' Administration. A civil action seeking such review could be brought in Federal district court in either the home district of the claimant or in the district court where the Board of Veterans' Appeals is situated (presently the District of Columbia), and must be brought within 180 days (the same period as is allowed for bringing an action in Federal court in connection with a tort claim against the United States, as provided for in 28 U.S.C. 2401(b), following final denial of such claim by the Federal agency involved, as required by 28 U.S.C. 2675(a)) after the notice of the Board of Veterans' Appeals decision is mailed to the claimant pursuant to new section 4004(d) (as proposed to be added by clause (3) of section 106 of the Committee bill).

Subsection (c) of new section 4025: Would require that the complaint in a case seeking court review of a decision relating to a claim for

benefits, brought pursuant to subsection (b) of this new section, shall include sufficient information in the complaint (for example, the date of the final Board of Veterans' Appeals decision and the claimant's VA claim number) to assist the VA in identifying and locating the claimant's file.

Subsection (d) of new section 4025: Would require the Administrator to file with the court, together with the answers to the complaint, certified copies of all of the records upon which the findings of fact and decision complained of are based or, if the Administrator determines that the cost of filing all of those records would be unduly expensive, would permit the Administrator to file a complete index of all of the materials comprising these records. If such an index is filed, the reviewing court would consider requests from all parties for the filing of specific record materials and, thereafter, would order the Administrator to file certified copies of the indexed items that the court deems relevant to its consideration of the case.

Subsection (e) of new section 4025: Would provide that the court has the power to dispose of a case on the pleadings and record certified under subsection (d) of this new section. It is anticipated that the court's use of this authority should reduce unnecessary expenditures of judicial resources. As noted in the "Final Report—Study of the Social Security Administration Hearing System" by the Center for Administrative Justice (October 1977): "The amount of time invested in average case [under the SSA] is undoubtedly very small. Most disability cases present simple issues. There is no trial and often not even an oral appearance."

Subsection (f) of new section 4025: Would limit judicial review as provided for in subsection (b) of this new section to cases in which the initial claim for benefits is filed with the Administrator (pursuant to present section 3001(a)) by the end of the fifth fiscal year after the fiscal year in which the Act becomes effective. The provision would have no effect on the availability of remedies under new chapter 72 in connection with any claim filed before such time. This "sunset" provision on new claims is intended to require the Congress to evaluate the new judicial review provisions before making such provisions permanent or extending them further. In addition, this subsection would preclude actions being brought under this new section regarding matters under present chapter 19 of title 38, relating to insurance, and under present chapter 37 of title 38, relating to home, condominium, and mobile-home loans and loan guaranties. There are currently in both chapters provisions for, and procedures established relating to, judicial review, and no need to change such procedures has been suggested or shown.

New section 4026.—Scope of review: Would define a reviewing court's role in considering actions brought under the proposed new judicial review chapter. The provisions are derived, with certain modifications, from the APA scope of review provisions in 5 U.S.C. 706.

Clause (1) of subsection (a) of new section 4026: Would authorize a reviewing court to decide all relevant questions of law and interpret constitutional and statutory provisions and to determine the meaning or applicability of the terms of an action of the Administrator. As discussed above with respect to subsection (b) of new section 4025

(as proposed to be added by this subsection of the Committee bill), there is an emerging body of case law which holds that courts are not barred by present section 211(a) from reviewing questions relating to the legal authority of the Administrator, under the Constitution or statutory provisions, in matters not directly relating to claims for benefits (for example, the decision in *Plato* v. *Roudebush*, 397 F. Supp. 1295 (D. Md. 1975), where the court permitted a constitutional challenge to VA procedures relating to pension benefit terminations). This new provision expands that case law to include questions of law in cases involving claims for benefits.

Clause (2) of subsection (a) of new section 4026: Would authorize a reviewing court to compel action of the Administrator that the Administrator has unlawfully withheld.

Clause (3) of subsection (a) of new section 4026: Would define the court's authority to hold unlawful and set aside decisions, findings, and conclusions of the Administrator—except findings of material fact made in reaching a decision on a claim for benefits, the review of which would be governed solely by clause (4) of this subsection, discussed below. Specifically, the court would be empowered to reverse a decision of the Administrator if such a decision is found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; (C) in excess of statutory jurisdiction, authority or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law. As noted above, this authority to reverse is largely derived from the APA.

Clause (4) of subsection (a) of new section 4026: Would provide that, in the case of a finding of material fact made in reaching a decision on a claim for benefits, a court is empowered to hold unlawful and set aside such a finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside. This authority is specifically limited so as to require the court, before setting aside the finding, to specify where it finds the record to be deficient and to remand the case once, for a time-limited period, to allow the Administrator either to reconsider the decision or substantiate the record. It is the Committee's intention that this limit on a reviewing court's authority to set aside findings of fact in individual claims cases, together with the provision limiting court review of factual issues in such cases to an evaluation of whether a finding is so utterly lacking in a rational basis as to result in a manifest and grievous injustice, should serve to restrict court review of factual matters substantially more tightly than is the case where review is authorized (as in the APA, 5 U.S.C. 706) to determine whether a Federal agency's decision on a factual issue is "supported by substantial evidence". Thus, the role of the Board of Veterans' Appeals as the primary expert arbiter of factual matters involving claims for VA benefits would be preserved.

Subsection (b) of new section 4026: Would incorporate the rule of prejudicial error from the APA (5 U.S.C. 706) in order to define further a reviewing court's role. Thus, pursuant to this rule, a court would be expected to disregard errors in the administrative record that are not significant to the outcome of the matter.

Subsection (c) of new section 4026: Would clarify a reviewing court's role in relation to questions of fact decided by the Administrator by specifying that in no event shall such findings be subject to a trial *de novo* in the reviewing court.

Subsection (d) of new section 4026: Would provide that, in reviewing a matter resolved by the VA solely on the basis of a failure to conform to VA regulations or procedures, the reviewing court may consider only those issues relating to the validity of or conformity with the regulation or procedure. Thus, if a court were to uphold the validity of a regulation or procedure and its application to the facts of a case, the matter would be ended; but if, on the other hand, the court were to rule that the regulation or procedure is unlawful, the underlying claim for benefits must be returned to the VA for its consideration, and the VA's role as the principal arbiter of VA claims matters would thus be preserved.

New section 4027.—Remands: Would provide for three different types of remands (two mandatory and one discretionary), in addition to the mandatory remand provision to be provided for under new section 4026(a)(4). Under the first, the court would be required to remand the case, if the Administrator so requests after it is appealed to court and before the Administrator files an answer, for a single reconsideration by the Administrator, which must be completed within 90 days or the matter would be returned to court. This provision is derived from a similar one in the SSA (42 U.S.C. 405(g)) but modified to place a specific limit on the amount of time allowed before the case must be returned to court. The second remand provision would allow the reviewing court, in its discretion, to remand a case for further action after the Administrator has filed an answer. The third remand provision would require a court to remand a matter when either party applies for leave to adduce further evidence and shows "good cause" for the remand. In the Committee's view, the burden of showing good cause for the remand should be applied to protect parties and administrative and judicial processes from dilatory practices but not so as to create undue impediments to the Administrator's consideration of additional evidence bearing on the merits of a claim. The new section would thus authorize a reviewing court to specify a time period within which the Administrator must act on a matter remanded under either the second or third remand provisions in this new section.

New section 4028.—Survival of actions: Would provide that actions brought under new section 4025 would survive the tenure of any individual as Administrator.

New section 4029.—Appellate review: Would provide that decisions of district courts pursuant to the new judicial review chapter would be subject to review in higher Federal courts in the same manner as other civil judgments.

Subsection (b) of section 302 would amend the table of sections at the beginning of chapter 71, relating to the Board of Veterans' Appeals, to reflect the addition of the new subchapter II proposed to be made by subsection (a) of this section of the Committee bill.

Section 302—Cost.—Enactment of this provision is estimated by the Congressional Budget Office to result in costs of $2.8 million to the Veterans' Administration in fiscal year 1983 and of $0.5 million to the Federal court system. This latter cost estimate assumes that additional judgeships (and supporting staff) would be authorized by the Congress to deal with the judicial workload generated by allowing court review of VA decisions. This assumption may prove to be fallacious in light of the enactment of Public Law 95–486 in the 95th Congress which authorized an additional 117 district court judgeships and 35 circuit court judgeships. Although it is clear that these additional judges were designed to reduce the Federal court workload existing at that time, it seems unlikely that the Congress would be prepared to act to add still more new judgeships so soon after such a significant increase. In any event, it is clear, as noted in the cost estimate of the Congressional Budget Office, that the Committee bill does not authorize any additional judgeships and any such authorization, and attendant cost, would have to be considered separately.

Section 303

Would amend present section 1346 of title 28, United States Code, relating to the jurisdiction of Federal district courts when the United States is the defendant, to provide that the exclusion contained therein limiting the jurisdiction of Federal district courts in matters involving pensions shall not apply to VA pension matters. This is a conforming amendment to effectuate the purpose of the new subchapter II of chapter 71 that would be added by section 302 of the Committee bill.

Section 303—Cost.—Enactment of this provision is estimated to entail no costs.

TITLE IV—ATTORNEYS' FEES

Section 401

Would amend present section 3404 of title 38, United States Code, relating, in connection with VA proceedings, to the recognition of agents and attorneys and to attorneys' fees, to revise the present title 38 limitation of $10 for claimants' attorneys' fees by providing for the approval by the Administrator of reasonable attorneys' fees, within certain specified limits, for representation of individuals before the Veterans' Administration following an initial decision of the Board of Veterans' Appeals, and for approval by the court of a reasonable attorneys' fees in cases appealed to court.

Clause (1) of section 401 would amend present subsection (c) of present section 3404, to provide for approval by the Administrator of attorneys' fees above the present $10 maximum for services rendered in representing a claimant following an initial decision of the Board of Veterans' Appeals, but would retain the $10 maximum limitation for cases resolved prior to Board action or upon the first decision in the case by the Board. With respect to claims resolved within the VA but following an initial decision of the Board, the Administrator's approval of an attorneys' fee is limited to:

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(A) if the claimant and attorney have entered into a contingent-fee agreement, an amount not in excess of 25 percent of the total of past-due benefits awarded, or

(B) if the claimant and attorney have not entered into such an agreement, the lesser of (i) the fee agreed upon by the claimant and the attorney or (ii) $500 (an amount which could be increased administratively by the Administrator in future years as warranted by changed economic conditions) except that a greater amount may be approved by the Administrator in an individual case involving extraordinary circumstances warranting such a higher fee.

Thus, approved fees for legal representation before the VA following an initial decision of the Board would generally be limited to a maximum of $500 unless the claimant and attorney have entered into a contingent-fee agreement and the matter is resolved in a manner favorable to the claimant, in which case the limitation would be 25 per centum of any past-due benefits awarded in the claim. The Committee does not anticipate that the Administrator would have occasion to approve a fee in excess of $500 on the basis of "extraordinary circumstances" except in the most unusual of cases where an attorney is able to demonstrate that the facts and circumstances of the case were so markedly different, in terms of complexity or difficulty, from the average case before the Administrator that an exceptional amount of time was legitimately required to prepare and present it.

Clause (2) of section 401 would further amend present section 3404 of title 38, United States Code, by adding five new subsections (d) through (h), as follows:

New subsection (d): Would define the court's role in approving attorneys' fees in cases appealed to court under the new judicial review subchapter as proposed to be added by section 302 of the Committee bill. In a case that is resolved in a manner favorable to the claimant (as that result is defined in new subsection (g) of this section), the court may approve a reasonable fee to be paid by the claimant to his or her attorney, with the limitation that, if the claimant and attorney have entered into a contingent-fee agreement, the amount of the fee is limited to 25 per centum of the total amount of past-due benefits awarded in the case. In the event that a matter is not resolved in a manner favorable to a claimant in court, the reviewing court may approve a limited reasonable fee, not to exceed $750, taking into consideration the extent to which success appeared reasonably probable when the action was filed. Of course, where the claimant and attorney have entered into a contingent-fee agreement, no fee could be approved unless court review ultimately results in an award of past-due benefits.

New subsection (e): Would provide authority for the Administrator to authorize payment to an attorney from any past-due benefits that are awarded by the Administrator or a court but would specifically preclude the VA from making payments out of any future benefits accruing to a claimant on the basis of the action.

New subsection (f): Would limit the applicability of the new attorneys' fees section, section 3404 (as proposed to be amended by this section of the Committee bill), to cases involving claims for benefits under laws administered by the VA. Thus, in all other types of cases

(for example, constitutional challenges to regulations, Freedom of Information Act cases, and other claims for relief other than VA benefits) where no claim for benefits is involved, the fee agreement between the individual and the attorney would not be restricted by the provisions of this section.

New subsection (g): Would provide that, for the purposes of this section, a claim is to be considered as having been resolved favorably to a claimant when any or all of the relief sought is granted.

New subsection (h): Would provide that a court may, in its discretion and as an extraordinary remedy, allow a prevailing party, other than the Administrator, reasonable attorneys' fees as part of the costs awarded after the decision where the court finds that the position of the Administrator was not substantially justified or that special circumstances make an award just. This provision is intended to permit a court to evaluate all of the circumstances of a claim and, in particular, the VA's basis for denying the relief requested and its conduct with respect to the claimant. The Committee's intention is that the court's evaluation of the VA's actions be similar to that undertaken by courts under the Equal Access to Justice Act, Public Law 96–481, where the party other than the government may be awarded attorneys' fees if the government does not prevail and cannot establish that its position was substantially justified.

Section 401—Cost.—Enactment of the provisions in section 401 are estimated to entail no cost.

Section 402

Would amend present section 3405 of title 38, United States Code, relating to penalties for certain acts, to delete a gender reference and to strengthen this provision by making it a Federal criminal offense for an attorney or other person willfully and intentionally to defraud a VA claimant.

Section 402—Costs.—Enactment of this provision is estimated to entail no costs.

TITLE V—MERIT PAY SYSTEM EXCLUSION FOR BOARD OF VETERANS' APPEALS MEMBERS

Section 501

Would amend subsection (b) of present section 4001, relating to the appointment of members of the Board of Veterans' Appeals, to provide that the provisions of section 5402 of title 5, relating to the application of the Merit Pay System to various Federal employees, shall not be applied to any member of the Board other than the Chairman and Vice Chairman. This provision would have the effect of removing Chief members of the Board—the administrative heads of three-member panels—from the Merit Pay System, a result the Committee believes is appropriate in light of the fact that these members do not have any significant supervisory or managerial responsibilities.

TITLE VI—EFFECTIVE DATES

Section 601

Would make the Act effective on the first day of the month beginning 180 days after the date of enactment.

Section 602

Would allow for judicial review, pursuant to proposed new section 4025 (as proposed to be added by section 302(a) of the Committee bill), of decisions of the Board of Veterans' Appeals rendered on or after April 1, 1982.

Tabulation of Votes Cast in Committee

In compliance with paragraph 7 of rule XXVI of the Standing Rules of the Senate, the following is a tabulation of votes cast in person or proxy by Members of the Committee on Veterans' Affairs at a April 28, 1982, meeting to consider S. 349.

The Committee agreed to report S. 349, with an amendment in the nature of a substitute, favorably to the Senate by a 12–0 vote, as follows:

YEAS—12	NAYS—0
Alan Simpson	
Strom Thurmond	
Robert Stafford	
Bob Kasten	
Jeremiah Denton	
Frank Murkowski	
Arlen Specter	
Alan Cranston	
Jennings Randolph	
Spark Matsunaga	
Dennis DeConcini	
George Mitchell	

Agency Reports

On July 14, 1981, the Veterans' Administration submitted to the Committee on Veterans' Affairs a report on S. 349. Also, the Office of Management and Budget and the U.S. Department of Justice submitted agency reports dated July 21, 1981, and January 29, 1981, respectively. These agency reports follow:

Office of the
Administrator
of Veterans Affairs

Washington, D.C. 20420

Veterans
Administration

JULY 14 1981

Honorable Alan K. Simpson
Chairman, Committee on
Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We are pleased to respond to your request for a report on S. 349, 97th Congress, entitled the "Veterans' Administration Adjudication Procedure and Judicial Review Act."

This measure is identical to S. 330, 96th Congress, which passed the Senate on September 17, 1979, and was not acted upon by the House of Representatives. The bill contemplates four major changes in present law concerning claims involving benefits administered by the Veterans Administration. First, the bill would codify, with some changes, the internal adjudication procedures now used by the Agency in making benefit decisions. Second, it would statutorily subject VA rulemaking to the provisions of the Administrative Procedure Act at 5 U.S.C. § 553. Third, the bill would provide access to the courts to claimants who are dissatisfied with VA benefit decisions, and eliminate the operation of 38 U.S.C. § 211(a) as a bar to any civil action otherwise authorized by law. Finally, this legislation would substantially revise the current $10 statutory limitation on the fee an attorney may receive for representing an individual claimant in prosecuting a claim for veterans' benefits.

Before discussing the various provisions of S. 349, we would like to briefly review the VA's position on the issues it addresses. Many of these issues were discussed during the hearings held by this Committee in the last Congress on S. 330, and in the 95th Congress on S. 364. Such a review may prove helpful, since the Agency's current position on judicial review and related issues differs from that previously expressed with regard to S. 330.

Historically, the Agency has been in agreement with the longstanding congressional policy to preclude judicial review of the decisions of the Administrator. However, on October 7, 1977, in our report to this Committee on S. 364, we suggested that the finality statute, 38 U.S.C. § 211(a), should be amended to provide veterans with access

to the Federal courts to resolve any constitutional questions arising from the administration of VA programs. Moreover, we stated that, if Congress deemed it appropriate, we no longer opposed limited judicial review of individual benefit decisions not involving constitutional questions. This neutral position was again expressed in conjunction with S. 330, on which we reported to the Committee on March 21, 1979.

In addition, although we believed then, as we do now, that our current adjudication procedures meet all of the requirements of fundamental fairness and comport with the evolving concept of "due process," we previously suggested that if Congress believes additional procedural requirements at the administrative level are desirable, they should be clearly specified in title 38, and predicated upon conformity with the unique nature and realities of VA functions and procedures. Finally, we stated that we would not object to a modification of the present attorney fee limitation, provided the best interests of veterans and other claimants are protected.

The present bill, as did S. 330, addresses many of the complex issues involved in these areas. Our report discusses these issues, identifies problems we perceive in S. 349, and articulates our modified position on judicial review.

As mentioned above, we have reassessed the desirability and efficacy of the proposed legislation on judicial review of VA benefit decisions. This reevaluation has been undertaken with the goal of assuring, on the one hand, that veterans, their dependents, and their survivors receive constitutional due process protections equivalent to those rights available to other Americans; and, on the other hand, that the administration of veterans' benefits is not overly burdensome upon either our claimants or the Government. In the context of the economic program of the present Administration, we believe that any proposed legislation which would generate additional expenditures of Government funds, particularly in increasing the staff of the VA and the administrative burden upon the Agency, should be examined with great circumspection. A further concern, of course, is the cost impact upon the Department of Justice and the Federal courts which would result from judicial review legislation. Only if there is demonstrated a clear need which justifies the new expense, will we support such new legislation.

Our position on S. 349 is one of opposition. It is our considered opinion that, on balance, the informal, non-adversary nature of our claim procedures, combined with our willingness to assist in developing evidence, to provide a personal hearing at virtually any stage of the adjudication process, and to resolve any reasonable doubt in favor of granting benefits, affords our claimants at least a parity of due process with all other citizens. Moreover, the right to appeal and obtain a de novo review by the Board of Veterans Appeals, without the significant costs of litigation, endows a VA claimant with a practical and effective brand of due process which is far less onerous than judicial review would be. Accordingly, we conclude that legislation such as S. 349, providing for court review of individual benefit determinations, is neither necessary nor advisable.

We continue to believe that there should be access to the courts for challenges to the constitutionality of veterans' benefits legislation, regulations, and procedures. This notion logically flows from a 1974 decision of the U.S. Supreme Court which held that 38 U.S.C. § 211(a) does not preclude judicial inquiry into whether a statute establishing a veterans' benefit program is constitutional. Clearly, determinations as to constitutionality and statutory interpretation are uniquely within the power and expertise of the judiciary. In addition, we are cognizant of an emerging trend in several Federal district courts and courts of appeals toward permitting judicial review of allegations that a regulation was promulgated in excess of the Administrator's authority or is otherwise contrary to law. This growing body of case law would seem to provide a sufficient basis for review of substantive agency actions of broad, binding application, without the need for new legislation.

As for judicial review of individual benefit decisions, our continuing study of the issue leads us to oppose modification of the present law. The courts have consistently maintained the validity of 38 U.S.C. § 211(a) in its present form, declining to review the technical and complex fact-specific decisions of the VA on individual claims. Moreover, we do not believe the record reveals deficiencies in VA's present handling of individual benefit decisions such as would warrant the imposition of judicial review of such decisions, or the enactment of the other sweeping changes proposed in S. 349. Because of the problems which we perceive in the bill, as well as the costs which would result, we cannot support its enactment.

In considering the provisions of S. 349, we believe that a brief review of the history of the finality statute, 38 U.S.C. § 211(a), together with an explanation of current VA claims procedures, will be helpful in understanding the issues raised by the proposed legislation. A more detailed discussion of the legislative history and judicial construction of the present finality and attorney fee statutes, as well as a thorough description of our claim procedures, may be found in the three Attachments to this report.

Judicial Review of Administrator's Decisions

The legislative history and the judicial construction of subsection 211(a) of title 38, United States Code, reflect a continued, longstanding intent by Congress to maintain the finality of decisions of the Administrator of Veterans Affairs. Subsection 211(a), as amended in 1970, provides:

> On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

The constitutionality of that provision has been upheld over the years, based in part on the theory that Congress may provide an exclusive administrative remedy when it creates rights in individuals against the Government. However, recent court decisions have qualified the sweeping immunity from court review provided in subsection 211(a) by assuming jurisdiction, not only of challenges to the constitutionality of statutes, regulations, and procedures governing Veterans Administration benefits, but also of challenges to the Administrator's authority to promulgate regulations.

The most significant of these cases is Johnson v. Robison, 415 U.S. 361 (1974). In Robison, the Supreme Court declared that subsection 211(a) does not preclude court review of challenges to the constitutionality of veterans' benefits legislation. On the merits, the Court upheld the constitutionality of a statute denying veterans' educational benefits to conscientious objectors who had not served in the military but had instead performed alternative service.

The rationale of the Robison holding was extended in Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1975), to permit review of VA hearing procedures. The court held that the VA's failure to provide a pension recipient an opportunity for a pretermination hearing was a denial of plaintiff's due process rights and that subsection 211(a) does not preclude court review of the constitutionality of VA procedures. This case has been relied on as a basis for jurisdiction in a number of subsequent suits questioning the constitutionality of agency procedures.

Further development following Robison has taken place in a series of cases in which both institutions and individuals have sued to challenge the validity of VA regulations. In each case a Federal appellate court held that, notwithstanding the language of subsection 211(a), questions of the statutory authority underlying the promulgation of regulations are judicially cognizable. The leading example is Wayne State University v. Cleland, 590 F.2d 627 (6th Cir. 1978), in which regulations governing the veterans' educational assistance program were attacked as being in excess of statutory authority. The court considered the merits of the regulations and ruled in favor of the Government, holding the regulations to be valid. More recently, a female veteran has successfully challenged a regulation barring VA hospital care benefits for routine pregnancy and childbirth. Kirkhuff v. Cleland, No. 79-2310 (D.D.C. May 8, 1981).

It must be kept in mind that Robison and its progeny have all involved statutes, regulations, or procedures, i.e., congressional or agency decisions and practices of universal, binding application. We point this out in order to stress the continued vitality of subsection 211(a) in shielding the Administrator's decisions on individual, fact-specific cases from judicial review.

A recent case applying this vital distinction was Carter v. Cleland, 643 F.2d 1 (D.C. Cir. 1980), in which the plaintiff sought court review of the VA's determination, affirmed by the Board of Veterans Appeals, that she was not entitled to receive a survivor's pension. Attempting to circumvent the finality statute, the plaintiff characterized her lawsuit as a challenge to VA regulatory action, although no regulation was actually involved; plaintiff alleged that an internal administrative guideline, interpreting existing statutory and regulatory requirements determining her eligibility for benefits, was invalid as being in excess of the Administrator's statutory authority. The court recognized that the plaintiff was actually seeking review of the Administrator's final decision on the application of the particular facts of her claim to the pertinent laws and regulations, and concluded that subsection 211(a) barred such review.

Current Adjudication Procedures

Current Veterans Administration claims procedures are designed to assure the claimant due process and to prevent any possible abuse of discretion by the Administrator. These procedures are defined by statutes and regulations which charge the VA with the duty to assist the claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law, 38 C.F.R. § 3.103(a). Further, if the evidence presented raises a reasonable doubt regarding service origin, degree of disability, or any other point, VA regulations provide that such doubt is to be resolved in favor of the claimant. 38 C.F.R. § 3.102.

The most salient characteristic of the VA claim process is its informality. In most cases, a claimant may submit an application without need of any assistance, and without an attorney. If a claimant desires assistance, or needs advice, access is provided to VA employees who specialize in answering inquiries and assisting in the development and submission of claims. At the same level, there exists a wide network of veterans' service organizations which furnish technically proficient claims specialists at no charge to assist claimants in the presentation of their claims.

In almost all cases, a claimant need do nothing more than file a claim on a proper application form. Generally, the Agency will procure all of the evidence necessary to establish the claimant's eligibility for the benefits sought. Where the evidence is insufficient to grant the benefit, the claimant is advised what evidence is required and what sources are acceptable.

Any decision with which a claimant disagrees may be appealed within the Agency by merely filing a Notice of Disagreement. This will initiate a review of the claim and, if it remains denied, the preparation of a Statement of the Case. A Statement of the Case sets forth the facts and law relied upon to reach the unfavorable decision and the reasons therefor, and is designed to assist the claimant in preparing the best arguments possible to support the claim on appeal. If, after receiving the Statement of the Case, a claimant remains dissatisfied with the decision, the appeal will be heard by the Board of Veterans Appeals. The Board's decision, made after a complete and independent review of all of the evidence of record, is final.

Hearings are available at almost any point in the claims process, both at the initial level of adjudication and at the appellate stage. Such hearings are conducted informally, and, although the Agency attempts to provide all possible assistance, a claimant may be represented by an attorney or one of the service organizations' claim specialists.

The foregoing procedures have evolved over the years and in general have functioned well by providing maximum services to the veterans of all eras. In addition, we believe that they meet all of the requirements of fundamental fairness and compare favorably with the procedures of other Government agencies administering benefit programs. Finally, we believe that our procedures continue to comply with the evolving concept of "due process." This is one of the reasons we believe legislation such as that proposed in S. 349 is unnecessary.

In our reports to this Committee on S. 364, 95th Congress, and S. 330, 96th Congress, we stated that to the extent Congress concludes that changes in our procedures are desirable, they should be effected by amending title 38 rather than merely subjecting the VA to the general constraints of chapter 5 of the Administrative Procedure Act.

We suggested that this would provide an opportunity for a more precise specification of any such changes, tailored to VA's unique functions and procedures. We further suggested that if Congress deems it advisable to formalize our procedures, such formalization should occur at the appellate level rather than at the initial claim level.

Title I--Adjudication Procedures

It is apparent from the substance of the changes contemplated by title I of this bill that the proposal does not take issue with our basic position that VA procedures function fairly and efficiently in the overwhelming majority of cases. In fact, many of the provisions of title I would merely have the effect of codifying our present adjudication procedures with little or no substantial change.

In this connection, we do not believe that codification of the "benefit of the doubt" standard in section 101 of the bill would require a significant departure from our current policy. As noted above, we have for some years followed a policy, articulated in our regulations at 38 C.F.R. § 3.102, of resolving any reasonable doubt in favor of the claimant. This doctrine applies where a reasonable doubt arises concerning service origin, degree of disability, or any other point. S. 330, 96th Congress, provided for statutory codification of our policy for two reasons: first, to allay the concern of several commentators that, once subject to judicial review, VA might abandon the rule lest reviewing courts overextend its scope and grant benefits in undeserving cases; and, second, to clarify the standard as stated in the regulation, so as to remove what the Committee report on S. 330 called "sometimes internally inconsistent terms." Aside from these theoretical concerns, we know of no evidence or allegation that the present reasonable doubt standard, as applied, is inadequate.

We observe that the term "benefit of the doubt" has been used instead of "reasonable doubt" in response to our previous recommendation, to avoid confusion with the more familiar usage of the latter term in criminal law. We further note that the provision concerning burden of proof in the proposed new subsection 3007(a) is, in essence, a restatement of our current regulatory requirement. Accordingly, enactment of this section of S. 349 would not alter our present pro-claimant orientation. Nevertheless, consistent with our current position opposing judicial review of

the factual findings in benefit decisions, we now believe it would be preferable to forebear such legislation and permit the present, longstanding agency policy to continue in effect.

The provisions of section 105 of S. 349 amending 38 U.S.C. § 4003 to require notice and an opportunity for a hearing, and in section 106 amending 38 U.S.C. § 4004 to require an opportunity for a hearing prior to a Board of Veterans Appeals (BVA) decision on a claim for benefits do not differ from our current practices in these areas. The removal of the statutory limitation, at 38 U.S.C. § 4004(b), that new and material evidence sufficient to permit the BVA to reopen an otherwise final decision must be in the form of official reports from the proper service department, also comports with the Board's present practice. In line with our liberal policy of assisting claimants to receive every benefit to which they are entitled, the Board reopens a prior decision upon the receipt of new and material evidence in any form. For the most part, the present practices of the BVA are already in compliance with those provisions of S. 349 requiring the Board to promptly send the claimant and his representative notice of its decision, as well as those specifying what information is to be included in a BVA decision.

S. 349 would also restate or codify many of our current hearing procedures. New section 4010 of title 38, in section 109 of the bill, would authorize the Administrator, in the course of any hearing, investigation or other proceeding, to administer oaths and affirmations, examine witnesses, and receive evidence. This provision closely parallels similar authority now granted to the Administrator in 38 U.S.C. § 3311. This new section also would permit the Administrator to receive either oral or documentary evidence even though such evidence may be inadmissible in a court of law. The Administrator would be permitted to exclude irrelevant, immaterial, or unduly repetitious evidence. This provision clearly indicates that the evidence submitted at a hearing need not conform to the formal rules of evidence, and at the same time provides the Agency with the means to exert some degree of control over the submission of evidence in a manner not inconsistent with the VA's existing liberal policies.

New section 4010 would also codify many of the hearing rights now granted to a claimant, such as the opportunity to examine and obtain copies of his or her VA records, to present witnesses and evidence, to make oral arguments, to submit written contentions and rebuttal evidence, and

to present medical opinions. While the language of the provision concerning disqualification of a VA employee in the course of a hearing, investigation, or other proceeding because of bias would require a more formal procedure to raise this issue than is now required, it does not appear likely to prove overly burdensome to a claimant. We would note, however, that provision for disqualification of BVA members already exists, at 38 C.F.R. § 19.147. Thus, although the language of section 4010 is adopted from the hearing provisions of both the Social Security Administration, 42 U.S.C. § 405(b), and the Administrative Procedure Act, 5 U.S.C. § 556, it would permit the retention of many practices now in use in the VA without substantial change.

With respect to the new section 4011 of title 38, also to be added by section 109 of S. 349, dealing with notice of procedural rights, we note that our current procedures substantially comply with the proposed provision. We would only add that the final provision of this section, requiring the Administrator to include in the notices "such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim" is a generally meaningless and therefore unnecessary addition to this section.

As explained above, many of the procedures which would be required by title I of S. 349 are already being followed and would have little or no additional impact on the adjudication of veterans' benefit claims. However, there are several provisions in title I which would require substantial changes to our current procedures.

The most obvious change in VA claim procedures would result from section 110 of the bill, which would mandate a two-pronged study, lasting two to three years, to test alternative methods aimed at resolving benefit claims faster and at more convenient locations for claimants. Section 110(b)(2), calling for at least quarterly visits by a panel or panels of the BVA to three geographic areas to conduct appeal hearings, would increase the frequency of BVA visits to the selected regional offices, and would have significant impact upon BVA staffing, travel expenses, and workload. Section 110(b)(1), moreover, would require the provision of an additional tier of adjudication at the regional office level in at least three geographic areas; in effect, the

claimant could request a second consideration of the claim, by a new adjudication panel, at the agency of original jurisdiction, be afforded a hearing, and receive a second Statement of the Case, all while retaining the right to appeal to the BVA.

This pilot project conducted pursuant to section 110 would, in our view, add an unnecessary delay to consideration of claims at the selected regional offices. We can understand the inclination of the drafters to believe that a "second look" may result in allowance of a claim at the regional office level, thus obviating the need for appeal to the distant BVA. Nevertheless, besides the fact that there are at least fifteen regional offices which currently lack sufficient numbers of adjudicative personnel to provide a second panel which is unfamiliar with a case, we are of the opinion that adding one more layer of review would not be of significant value to either the Agency or the claimant. There simply has to be a limit to the number of times a case is evaluated. At present, a claim, once initially denied, is reconsidered upon the filing of a Notice of Disagreement, prior to the preparation of a Statement of the Case, and is again reconsidered, de novo, by the BVA after an appeal is filed.

In view of the foregoing, we seriously question the utility of the aspect of the study which would mandate a trial program of additional adjudication. As for the enhanced schedule of BVA regional office visits, our principal reservation concerns the drain on the Board's resources resulting from the increased travel involved.

The use of written interrogatories in the adjudication of VA benefit claims is another change contemplated in S. 349, to be codified at new subsection 4010(c) of title 38. This provision is apparently intended to complement the overall judicial review scheme by furnishing a tool for use by the the claimant in gathering evidence. We find the provision objectionable because it would inject an adversarial tone into the decision-making process unnecessarily, in light of the already existing authority which the Administrator has, under 38 U.S.C. § 3311, to issue subpenas and otherwise compel the production of evidence on a claimant's behalf.

Section 108 of the bill provides a change which could have an impact upon the BVA. It would establish a standard by which the Board would evaluate requests by claimants or their representatives for advisory medical opinions, and require the Board, where it declines to seek such an opinion, to provide a statement as to the basis for that decision. Under the codified standard, the Board would be obligated to obtain an advisory medical opinion, upon request, whenever a case presents "a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case," and the Board has taken "appropriate action to attempt to resolve the disagreement." At present, the BVA obtains such opinions, under 38 U.S.C. § 4009, either on its own initiative or at the request of a claimant or representative, where the Board believes the dispositive medical issue is so complex or controversial as to warrant an outside review. Seventy-three medical schools now participate in the Independent Medical Expert (IME) program, in which cases are referred to the schools for evaluation of the record by medical specialists designated by the schools.

Any estimate of the number of requests for an independent medical opinion that would actually be made under this provision can only be a matter of speculation. Currently, the BVA obtains about 200 IME opinions annually, mostly in cases where the issue is whether a disability is service-connected. This figure may be expected to rise proportionately with the Board's caseload, but whether the new standard would generate additional requests for opinions is problematical. We presume no conscientious representative wishes to risk criticism for failure to take advantage of all the resources available in the effort to obtain the benefits claimed. In addition, there could be various interpretations of the term "substantiated findings or opinions." We believe it should be read to mean complaints, symptoms, and manifestations of a disease or pathologic state corroborated by physical findings on examination and appropriate laboratory tests.

We believe the bill properly provides that the Board's decision to forego an IME opinion would not be judicially reviewable. Such provision could prevent abuse of the IME program and forestall an unwarranted expansion of the program to an extent which might overtax the limited number of medical schools available to participate in it.

We do believe that, in some cases, the increased use of IME opinions could be a valuable tool in establishing a claimant's entitlement to VA benefits. As an alternative to a statutory provision in this area, we suggest that a more effective method to expand the IME program would be through regulations prescribed by the Administrator after any problems in the current program susceptible to correction by expanded use of independent medical opinions are identified.

In summary, we note that many of the procedures required by title I of S. 349 would have little or no additional impact upon the adjudication of veterans' benefit claims, since VA's current claim procedures essentially comply with the goals underlying the proposals. Obviously, however, much of title I is intended to be enacted to complement the changes contemplated by title III, i.e., judicial review of VA claim decisions. Accordingly, our opposition to title III, discussed infra, compels us to point out that title I of the bill would create burdens upon the Agency incommensurate with the benefits it would offer to claimants, and its provisions should not separately be enacted.

Title II--Veterans Administration Rule Making

Title II of the bill would require the VA to comply with the public notice and comment provisions of section 553 of title 5, the "informal" rulemaking provision of the Administrative Procedure Act (APA). With respect to this provision, it should be observed that the Agency has voluntarily been in substantial compliance with the requirements of section 553 since April 1972. At that time, a regulation, 38 C.F.R. § 1.12, was promulgated which requires notice of regulatory changes to be published in the Federal Register in accordance with the provisions of the APA. This regulation is binding on all elements of the VA.

Therefore, it is our current practice to publish proposed regulations in the Federal Register in advance of their effective date, offer the public opportunity for comment, and publish our final version of the regulation with a summary of the comments received and the reasons they were or were not accepted. In view of our voluntary compliance, we have no serious objection to this provision.

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As a technical matter, we note that section 201 of the bill would specifically preclude our reliance on subsection (a)(2) of section 553, which allows an agency to forego public notice and comment for regulations dealing with "loans, grants, [or] benefits," the so called "proprietary exemption." It would not prevent VA's reliance on subsection (b) of section 553, which provides further exceptions. This dichotomy comports with our current regulation, so that the Agency could continue to issue some regulations without a public comment period when, for example, public notice and comment would be "impracticable, unnecessary, or contrary to the public interest." As we do now, we would publish a brief statement justifying the exception relied upon in our Federal Register notice accompanying the final regulation.

We note that Congress has had opportunities to modify the proprietary exemption over the years. In this Congress, there are several bills which would accomplish this, among them S. 890 and S. 1080. However, the basic provision has remained unchanged since enactment of the APA in 1946. We question the need to single out the VA on this issue, when we have already waived our right to claim the exemption through our regulation.

Title III -- Judicial Review

As mentioned above, the VA had historically agreed with Congress' longstanding intent to bar judicial review of decisions of the Administrator. The position which we adopted in 1977, and to which we adhered through the 96th Congress in consulting with your Committee on S. 330, was twofold: First, we supported the logical extension of the Supreme Court's holding in Johnson v. Robison, supra, to permit court review of all constitutional questions arising in the Agency's administration of veterans' programs; second, we indicated we would not object to judicial review of individual benefit claims if Congress concluded legislation to authorize such litigation was desirable.

During the extensive consideration of earlier proposals to modify the statutory prohibition of judicial review, we stressed several general factors which we believed should be addressed. Most of these remain viable, even considering our basic opposition to S. 349. However, should the Congress believe judicial review is necessary, we continue to support

our previously enunciated comments. First, we recommended that any such legislation should be specifically tailored to the VA and codified in title 38, United States Code. Second, it should be provided that one must exhaust all available administrative remedies (e.g., pursue a claim to the Board of Veterans Appeals first) before having the right to sue. Third, any judicial consideration should be limited to review of the administrative record, with the court precluded from engaging in de novo review. Permitting only a review of the record would enable us to retain what we view as the most important feature, indeed, the hallmark of VA claim adjudication, which is the informal, non-adversary nature of our procedures. Fourth, we noted the necessity for a specific grant of subject-matter jurisdiction, and one which would deal with the jurisdictional bar at 28 U.S.C. § 1346(d). Fifth, we indicated that judicial review legislation should preclude the litigation of decisions rendered by the Agency many years ago. Finally, we pointed out the need to insure that those VA programs already subject to judicial review would remain unaffected. These concerns should be met by any judicial review legislation concerning the VA, and we observe that title III of S. 349 attempts to deal with them all.

Section 301 of the bill would take the first step toward establishing a statutory scheme for subjecting the VA to judicial review by leaving 38 U.S.C. § 211(a) in place and expanding that provision's declared list of current exceptions to nonreviewability -- insurance and loan guaranty matters -- with reference to a new chapter 72, entitled "Judicial Review." This new chapter, set out in section 302 of the bill, would contain new sections 4025 through 4029 of title 38, entitled "Jurisdiction," "Scope of review," "Remands," "Survival of actions," and "Appellate review."

Federal district court jurisdiction to review any final decision of the Administrator on a "claim for benefits" would be granted by new section 4025(a), which would require that suit be filed within 180 days of notice of the decision. Venue for such an action would be in the judicial district of either the plaintiff's home or business, or the principal offices of the BVA. New section 4025(b) would specifically rule out 38 U.S.C. § 211(a) as a bar to "a civil action otherwise authorized by law" in "any matter not directly involving a claim for benefits." A definition at new section 4025(c) would declare the nature of a reviewable decision, viz., a final BVA determination under 38 U.S.C. § 4004(a) or (b), or a dismissal of an appeal by BVA under 38 U.S.C. § 4005 or § 4008.

We respectfully offer three criticisms of the proposed section 4025(a). First, the use of the term "claim for benefits" in the jurisdictional grant could resurrect a problem of interpretation which Congress sought to eliminate more than a decade ago. As described fully in Attachment A to this report, that term used to exist in 38 U.S.C. § 211(a), and was seized upon by the Court of Appeals for the District of Columbia Circuit as a means to narrowly construe the sweep of that section's nonreviewability edict. In a series of cases exemplified by Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967), the court held "claim for benefits" to subsume only original claims; thus, the court concluded that the finality statute did not preclude judicial review of decisions to reduce, suspend, or terminate benefits. In a clear expression that such result was not intended, the Congress reacted by amending subsection 211(a) in 1970 to remove the controversial term. We suggest that the return of such language to title 38 could lead to a situation in which courts could, by applying a Tracy analysis to new section 4025(b), provide access to claimants seeking review of initial VA decisions reducing, suspending, or terminating benefits without the necessity of obtaining BVA decisions first.

The "claim for benefits" term is used throughout the bill and could present similar interpretation problems in many other provisions as well as the one described above. Although it is impossible to predict that a court would interpret the "claim for benefits" language in this manner, prudence dictates that any provisions granting judicial review should be clarified by statute to delineate specifically the intent of Congress. We recognize, of course, that the Committee may wish to obviate the problem by developing legislative history to clarify its intent regarding the term. There is an emerging body of case law, however, indicating that the courts will not resort to explanations in legislative history unless the statutory language itself is vague. An example is National Small Shipments v. Civil Aeronautics Board, 618 F.2d 819 (D.C. Cir. 1980). The preferable approach, we believe, would be to either define the term in question in the statute, or remove it.

A second problem we see in new section 4025(a) is the 180-day period permitted between notice of final BVA action and filing of a complaint seeking judicial review. We believe six months is too long. By the time a claim has progressed from several regional office reviews to the BVA and been decided de novo by the Board, the issues in dispute

will certainly have crystallized. In the interest of freshness of the evidence, and of expeditious handling both in the Agency and the courts, we believe a 60-day limit on the right to bring an action would be sufficient. It is noteworthy that the law pertaining to judicial review of Social Security Administration decisions observes a 60-day period.

Finally, regarding new section 4025(a), we note that the venue provision would permit commencement of an action not only where the claimant-plaintiff lives or runs a business, but also where the BVA has its principal offices. Based upon the Board's present location, the possibility exists that a disproportionate caseload burden could fall upon the District Court for the District of Columbia.

Moving on to proposed section 4025(b), which would eliminate the application of 38 U.S.C. § 211(a) as a bar to any civil action "otherwise authorized by law," we believe it could create serious problems in our administration of veterans' programs. In the first place, its inclusion in a section entitled "Jurisdiction" is misleading, since the provision is not a jurisdictional grant and would not by itself provide a jurisdictional basis for suit.

The intended purpose of this subsection would seem to be to permit judicial review of challenges to VA regulations, practices, or procedures that would be available if brought against any other Federal agency. As we stated earlier, the case law is largely accomplishing this end. Subsection 211(a) is being interpreted as limited to individual benefit decisions, so that this section of the bill is simply not necessary. We might point out that this limitation on subsection 211(a) should not result in the substitution of courts' judgment for that of the Administrator in the substance of agency regulations or other policy decisions. Such traditional defenses as standing, ripeness, and exhaustion of administrative remedies remain available. Additionally, application of constitutional standards, such as due process of law, or statutory standards, such as those in the APA at section 706 of title 5, would define the scope of review sufficiently to restrict the courts to determinations on questions of law.

Our most serious reservations, however, concern the role of the reviewing court in actions instituted under new section 4025. New subsection (g) would empower the court to enter a judgment in accordance with new section 4026 or to remand the case in accordance with either of new sections 4026 and 4027. While we do not foresee that serious problems would arise from the remand provisions (requiring the court to remand once to the Administrator for further action where either the Administrator requests remand prior to answering the complaint or the court finds there has been agency error on a factual issue; and permitting the court, in its discretion, to remand after the answer has been filed, where either plaintiff or defendant shows good cause for leave to adduce additional evidence in the claim), we still question whether the Administrator's findings of fact in benefit decisions should be judicially reviewable.

The scope of review provided in the proposed section 4026 is patterned after the general provision in the Administrative Procedure Act, at 5 U.S.C. § 706, with the major difference being that the bill does not include the substantial evidence test in the enumerated standards of review. In essence, the scope of review provided by S. 349 would empower the court to (1) decide relevant questions of law, such as those involving constitutional, statutory, or regulatory interpretation; (2) compel action unlawfully withheld by the Administrator; and (3) reverse any decisions of the Administrator found to have been made without proper compliance with constitutional, statutory, or procedural dictates, or to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Recalling our reservation about the proposed section 4025(b), we can cite an example of the ambiguity it could cause. By its terms, expressed in its first clause, new section 4026 and the standards of review it contains are to be applied by the reviewing court in any action brought under section 4025. As stated earlier, it is our understanding that subsection 4025(b), which eliminates the use of subsection 211(a) as a bar to any civil action, is not intended as a jurisdictional grant. Therefore, no civil action is to be brought under its provisions alone. However, faced with the express direction to apply the provisions of subsection 4026 to all section 4025 actions, and the fact that the elimination of the use of subsection 211(a) as a bar is found in a section entitled "Jurisdiction," a court could conclude that

Congress intended subsection 4025(b) to operate as a jurisdictional grant. Here, then, is one more reason section 4025(b) should not be where it is in the bill.

We believe that any legislation subjecting VA benefit decisions to judicial review should be drafted to avoid confusion whenever possible, but particularly in regard to the scope of review. It is our opinion that any scope-of-review provisions finally adopted should be sufficiently narrow as to permit judicial action only in those few cases in which a VA benefit may have been unjustly denied. In the same vein, it is equally important that judicial review is limited to only those questions suitable for judicial determination, and that complex and technical factual questions that can best and most fairly be decided by the Agency not be subject to second-guessing by the courts.

The bill attempts to meet these objections by restricting a reviewing court's authority to reverse a decision of the VA on a factual issue only upon a finding that the Agency's decision was arbitrary, capricious, or an abuse of discretion, and only after first remanding the case to the Administrator for reconsideration or further substantiation of the record. We recognize that the drafters' intent in selecting the "arbitrary and capricious" standard is to restrict reviewing courts to a much more narrow scope of factual review than that permitted under the "substantial evidence" standard of the APA and applied in Social Security cases. Nevertheless, legal scholars remain undecided on such basic questions as whether the substantial evidence test and the arbitrary and capricious test are equivalents and, if not, which calls for broader review. K. Davis, Administrative Law of the Seventies § 29.00 (1976). In view of this uncertainty, we are concerned that, notwithstanding the bill's attempt to narrow the reviewing court's authority by eschewing the substantial evidence test and relying upon the arbitrary and capricious test, the grant of any authority to engage in review of agency fact-finding on individual claims may encourage some courts to examine the facts de novo and substitute their findings on factual determinations for those of the administrative decision-maker.

It is our belief that the scope-of-review provisions of S. 349 could well create a situation similar to that which has developed in court review of disability claims under

the Social Security Act. In the context of Social Security cases, court review of the Agency's findings of fact has resulted in substantial criticism that the courts freely substitute their judgment for that of the Agency. As a result, the former Department of Health, Education, and Welfare submitted, in the 96th Congress, a legislative proposal that would have precluded judicial review of the agency's findings of fact and thus restricted the courts to a review of only questions of law.

In considering a similar approach to judicial review of VA benefits decisions, we realize there are some who are concerned that such a scheme might be difficult to apply in actual practice. Under this school of thought, it is believed that because many VA cases, while basically involving resolution of factual issues, present a mixture of legal and factual questions, a reviewing court might misapply the scope of review. The result could be either a refusal by the court to consider mixed questions of fact and law, leaving the claimant with incomplete judicial review, or an examination by the court of all questions on the record as legal in character, exposing the Agency to review with no significant restraints.

While we agree that a number of VA decisions involve mixed questions of fact and law, it is our opinion that limiting the reviewing court's authority to questions of law would seldom, if ever, result in either of the above situations. Distinguishing mixed questions of fact and law in individual cases is a function that the courts are well suited to perform. In addition, given the current liberal tendency of the courts, we find it unlikely that a court would refuse to review a mixed question of fact and law. It is our belief that limiting court review to questions of law would encourage the courts to review only those questions suitable for judicial determination while discouraging them from substituting their judgment for that of the Agency on complex and technical factual questions which the Agency is most competent to resolve.

Finally, it must be recognized that the additional opportunity to correct factual decisions by judicial review may be particularly inappropriate and unnecessary for VA benefit decisions in view of the Agency's liberal policy of assisting a claimant to establish his or her entitlement to every

benefit that can be supported in law. It is our belief that the necessity for judicial review of agency fact determinations is substantially reduced in a benefits program which follows, as a basic tenet, the principle that whenever the evidence raises a reasonable doubt, such doubt is to be resolved in favor of the claimant.

The remaining provisions of title III of S. 349, dealing with identification and certification of the plaintiff's records, the five-year sunset provision, survival of actions, and appellate review, present no serious problems that we can foresee. It is obvious that title III is the product of much careful thought and consultation, and meets many of the reservations which arose in connection with judicial review bills previously introduced. Nevertheless, we suggest that the problems associated with permitting judicial review of the Administrator's individual benefit decisions outweigh any perceived benefit of such review. Accordingly, we cannot support title III.

Title IV--Attorneys' Fees

Under the existing attorney fee limitation provision, 38 U.S.C. § 3404(c), the Administrator is authorized to award from allowed monetary benefits a fee of no more than $10 to recognized claims agents or attorneys for successfully prosecuting claims before the VA.

This limitation is applicable regardless of the nature or extent of an attorney's assistance, whether it is strictly clerical, investigative, or includes the full prosecution of an appeal through the Board of Veterans Appeals. The VA regulations concerning this fee limitation may be found in 38 C.F.R. § 14.634, et seq. Those regulations further provide that expenses may be reimbursed by the claimant to the attorney or agent representative. Claimants and their representatives are expressly advised of this reimbursement for expenses provision in VA Form 1-4107, "Notice of Procedural and Appellate Rights," a form routinely used by VA regional offices in cases where a claimant has not received all of the benefits claimed.

Provisions similar to the current limit have been in effect for over 100 years. In spite of its acknowledged impact in severely restricting the availability of attorney representation for VA claimants, courts have consistently upheld its constitutionality. One of the more significant cases, if

only because of its articulation of the constitutional issues, is Gendron v. Saxbe, 389 F. Supp. 1303 (C.D. Cal.), aff'd mem. sub nom. Gendron v. Levi, 423 U.S. 802 (1975). Considering the informality of the VA claims procedure and the availability of veterans service organization representatives, the three-judge panel upheld the fee limitation against a challenge which included both due process and equal protection arguments. Another recent case upholding the constitutionality of this provision is Staub v. Roudebush, 574 F.2d 637 (D.C. Cir. 1978).

Apart from the longstanding and judicially sanctioned statutory restriction on attorney fees, it is valuable to inquire whether veterans under the current system have been well- or ill-served by such limitations. It is probably true that, except for those whose low income qualifies them for free legal services, the current fee limitation effectively precludes attorney representation before the VA. It should be noted, however, that the relatively simple procedures for making a claim and even for pursuing an appeal do not generally require the assistance of an attorney. Moreover, the wide-spread availability of free services from veterans' organizations who are able to render sophisticated and expert assistance in prosecuting a claim enables full benefits to be distributed to a veteran without any of it being consumed in expensive legal fees.

Such national service organization representativer are trained gatherers of relevant evidence, who make effective and pursuasive arguments. They understand the operations, specialized procedures, and laws of the VA. They also understand the issues involved in presenting a case before the VA. Furthermore, they have experience in evaluating the potential success of claims.

Most of these laws and rules of procedures are understandable to non-legal technicians such as service organization representatives, paralegals or claims agents as well as to attorneys. VA adjudicatory procedures, as noted earlier are intended to be, and in operation are, non-adversary in nature. It has always been the policy of this agency to assist the claimant in developing facts pertinent to a claim and to resolve all reasonable doubt in favor of the claimant. In cases where service medical records do not substantiate the claim, lay evidence of the existence of a condition can be accepted.

Our experience has been that the professional service organization representatives, although usually not attorneys, have attained a high level of competence and expertise in the field of veterans' laws. In our view, the present type and availability of representation is completely adequate for VA claimants, and accordingly, in the absence of judicial review of individual benefit decisions, we are opposed to any change that would increase the present $10 fee that an attorney or claims agent may receive for representing a claimant before the Agency.

Granted, if Congress were to enact legislation providing for judicial review of individual benefit decisions, it would probably be necessary to amend the current limitation on attorney fees. We would not oppose raising the fee limitation, or enacting a reasonable fee schedule, in that context. However, we are not yet prepared to support any significant change in the fee limitation in the absence of judicial review legislation. In addition to our general opposition to changing the current attorney fee limitation, we also have several misgivings about the specific attorney fee provisions in title IV of S. 349.

Section 401 of the bill would modify the existing $10 attorney fee limitation of 38 U.S.C. § 3404(c) to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the VA. This provision would not apply in cases where the VA is the plaintiff or where other attorney fee statutes are controlling.

Under this provision, in cases resolved within the agency after a claimant receives a Statement of the Case, the Administrator, pursuant to regulations, would be authorized to determine and approve attorney fees not to exceed the lesser of: (1) the fee agreed upon by the claimant and the attorney, (2) $500 (or a greater amount in an extraordinary case or if national economic conditions change; or (3) 25 percent of any past due benefits awarded in contingency fee situations. The existing $10 attorney fee limitation would continue to apply in those cases where the claim was resolved prior to the claimant's receipt of a Statement of the Case.

If the claimant, represented by an attorney, pursued his or her right to judicial review and the case was resolved in a manner favorable to the claimant at the court level, that is, all or part of the relief sought was granted, the court could determine and approve a "reasonable" attorney fee (to be paid by the claimant) as part of its judgment, except that if the attorney had taken the case on a contingent fee basis, the court could only award as an attorney fee an amount up to 25 percent of any past due benefits. In the event that a case appealed to court is resolved in a manner unfavorable to a claimant, the court's authority to approve a fee would be limited to a maximum dollar amount of $750. No award for payment out of future VA benefits could be made by either the Administrator or a court. Court review of the attorney fee determination of either the Administrator or a court would be available to a claimant or an attorney. The basis of such review of a fee determination made by the Administrator would be abuse of discretion. Finally, section 401 includes a provision whereby a court could, as an extraordinary remedy in a matter involving a claim for benefits appealed to court, award a claimant, who has prevailed in court, a reasonable attorney fee to be paid by the VA as part of the court's award of costs following judgment.

Section 402 of S. 349 makes a gender change and strengthens the existing provision, 38 U.S.C. § 3405, relating to attorney impropriety, to authorize a court to punish an attorney or other person for willfully and intentionally defrauding a claimant. We note that the existing section 3404(c) allows payment to claims agents as well as attorneys. S. 349 provides only for payment to attorneys, thereby excluding the possibility of claims agents receiving any remuneration for their services, but at the same time continuing to subject them to the criminal penalties of section 3405 if they accept any payments for their service. Currently there are less than one hundred recognized claims agents nationwide, and our experience indicates that these individuals are not performing representation duties with expectations of monetary reward. In the event that the present fee limitation in section 3404 is amended, however, we believe that some provision for minimal payment to claims agents in the administrative process might be retained.

Another of our concerns is in regard to the provision for a fee in excess of $500 in "extraordinary" cases. We believe that although such a fee may prevent a few instances of awarding unreasonably low attorney fees in complicated cases, the possibility exists that a significant number of attorneys will attempt to categorize their claims as "extraordinary" cases. Accordingly, we believe that the statute itself should provide some guidance or standards as to what would constitute an "extraordinary" case or, alternatively, grant specific authority to the Administrator to issue such standards.

Likewise, we are opposed to the provisions of proposed subsection (d) of section 3404, which would grant the court open-ended discretion in setting attorney fees at the court level where the attorney and claimant have not entered into a contingent fee agreement. In our opinion, such unlimited discretion could be abused and we therefore believe that even if no attorney-client agreement is involved a court should be limited to awarding either a definite percentage amount of past due benefits, for example 25 percent as occurs in Social Security cases, or a specific dollar amount.

Finally, in regard to the attorney fee provisions of S. 349, we object to proposed subsection (f) of section 3404 to the extent that it provides for judicial review of the Administrator's determination and approval of attorney fees. In this regard, it should be noted that attorney fee determinations made by the Social Security Administration are not subject to judicial review. We believe that any authority to determine attorney fees for representing a claimant before the VA should similarly exempt such fee determinations from judicial review.

Opening the door to court review of attorney fee determinations may engender a significant number of such cases. In an attempt to circumvent administratively determined fees, some attorneys will undoubtedly avail themselves of this opportunity to increase their fees. Although the scope of review is limited to "abuse of discretion," we believe this limitation may neither serve as a deterrent nor appreciably lessen the number of cases filed for review.

As background to our opposition of judicial review of administratively determined attorney fees, we note that the nonreviewability of final Social Security Administration fee determinations is well established in the case law. In a recent U.S. Circuit Court of Appeals decision, Copaken v. Secretary of Health, Education, and Welfare, 590 F.2d 729 (8th Cir. 1979), the court ordered dismissal of the action for lack of subject-matter jurisdiction over Social Security Administration determinations of attorney fees. The appellant attorneys had alleged that the Social Security Administration's approved fee, which was less than 25 percent of the past due benefits award, was arbitrary and capricious and an abuse of discretion. Further, they alleged that the Secretary's failure to provide an evidentiary hearing violated the due process clause of the fifth amendment. Appellants requested that the attorney fee determination be set aside and the case remanded to the Secretary to set a reasonable and adequate fee. The court held that it lacked subject-matter jurisdiction to review the Secretary's attorney fee determination because such an action is entrusted exclusively to agency discretion. The court observed that the administrative appeals procedures followed by the Social Security Administration (20 C.F.R. § 404.975) provided adequate protection even in the absence of a hearing. In addition, the court noted that a "legitimate and commendable governmental interest in utilizing maximum amounts of time and money on behalf of those the Act was primarily intended to benefit could be seriously impeded by provision of full evidentiary hearings on attorney petitions for fees." Id at 732. We fully support that conclusion and, accordingly, are opposed to judicial review of any agency attorney fee determination.

In sum, the VA's position on the concept of modification of the present attorney fee limitation is one of opposition. In the absence of judicial review of individual benefit decisions, and because of the availability of free, expert assistance offered by service organization representatives, we believe that a significant modification of the attorney fee limitation would lead only to unwarranted depletion of VA benefits by expensive and unnecessary legal fees. Likewise, even if Congress deems it appropriate to authorize judicial review of individual benefit decisions, we are opposed to certain of the modifications of the present fee limitation that would result from enactment of title IV of S. 349.

Cost Estimates

It is difficult to predict the number of dissatisfied claimants who may decide to appeal to the courts. Based upon the current workload, and using the Social Security system rate of appeals as a model, however, it may be anticipated that approximately 4,200 veterans' cases would be filed annually in Federal courts. We are unable to estimate either the costs of the increased caseload on the court system or the cost to the Department of Justice to litigate these cases.

It is estimated that the cost to the Veterans Administration of enactment of S. 349 would be as follows:

Fiscal Year	Cost
1982	9,483,000
1983	8,526,100
1984	10,574,100
1985	9,602,100
1986	9,673,100

These costs do not include any payments of attorneys' fees that may be awarded pursuant to the authority of the new subsection (i) of 38 U.S.C. § 3404. We are unable to estimate the cost of this provision since these fees will depend upon the number of claims allowed, the size of each claim allowed, the type of award and what each individual judge may ascribe as a "reasonable" fee.

In addition, these costs do not include estimated benefit costs, which would be less than $3 million in the first year and less than $1 million in subsequent years.

Further, given the retroactive feature of the bill, permitting any BVA denial since January 1, 1977 to be appealed to Federal court, there would be an estimated additional cost of $13,558,200 generated in costs of litigating the previous Board denials, assuming the 20% Social Security model applies to the number which would be taken to court.

We look forward to working with your Committee and the staff in further evaluation of S. 349.

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Advice has been received from the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

[illegible] GUSTIN, M.D.
Acting Administrator

For and in the absence of

ATTACHMENT A

LEGISLATIVE HISTORY AND JUDICIAL CONSTRUCTION OF ADMINISTRATIVE FINALITY IN DECISIONS ON VETERANS' BENEFITS

The historic response of both Congress and the executive branch has been to retain the concept of administrative finality and the attorney fee limitation. In considering any modification of this provision, we believe it valuable to examine closely the legislative and judicial history of the finality statute, 38 U.S.C. § 211(a), and its predecessors.

It has been clear, since long before enactment of the initial precursor statute to 38 U.S.C. § 211(a) in 1924, that the Congress intended to preserve the legislative power over congressionally provided gratuities. This principle was first stated by the Congress with respect to veterans' benefits when it enacted the Tucker Act in 1887. That Act, now codified in 28 U.S.C. § 1346(d), provides that, "[T]he district courts shall not have jurisdiction under this section of any civil action or claim for pension."

Several decisions of the Supreme Court recite the early history of the finality of decisions of the Administrator of Veterans Affairs under successively restated and strengthened statutory provisions currently set forth in 38 U.S.C. § 211(a). For example, in its 1924 decision, Silberschein v. United States, 266 U.S. 221, the court relied upon statutory provisions, enacted in 1919 and 1921, which conferred upon the chief executive of predecessor agencies of the Veterans Administration (War Risk Insurance Bureau and Veterans Bureau) regulatory and decisionmaking power (similar to that in section 210(c)) for administering the varied benefits programs entrusted to their agencies. Sustaining dismissal of an attempt for judicial review of a disability compensation determination, the Court, at page 225, upheld the then Director's authority as: "Final and conclusive, and not subject to judicial review, at least, unless the decision is wholly unsupported by the evidence or is wholly dependent upon a question of law, or is seen to be clearly arbitrary or capricious." (Emphasis added.)

A similar decision was rendered in the 1929 decision, Williams v. United States, 278 U.S. 255, but the result there was based upon a different finality provision (former 38 U.S.C. § 620) enacted by Congress in 1926 in connection with the World War I adjusted compensation (bonus) program.

An additional finality provision (former 38 U.S.C. § 705) was enacted in 1933 as section 5 of Pub. L. No. 2, 73d Congress. That section, relating to a revised system of gratuitious benefits granted in title I of the Act, provided that:

> All decisions rendered by the Administrator of Veterans Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision. (Emphasis added.)

(That measure was recognized by the Supreme Court in its 1934 decision, Lynch v. United States, 292 U.S. 571, as having been enacted to remove the possibility of judicial review for such gratuitous Veterans Administration benefits as pensions and disability compensation even under the exceptions suggested in its Silberschein and Williams, supra, opinions as well as the case of Smith v. United States, 57 F.2d 998 (4th Cir. 1932). The court distinguished that category of "privileges" from the contractual nature of veterans' insurance benefits, and cited as established law previous decisions such as Frisbie v. United States, 157 U.S. 160 (1895), which held that no one has a vested legal or property right to such a gratuitous benefit as pension.

Efforts to limit the statutory bars against judicial review of noncontractual Veterans Administration benefit matters then shifted to the District of Columbia Circuit, United States Court of Appeals. That court held in Hines v. United States ex rel. Marsh, 105 F.2d 85 (D.C. Cir. 1939), that one of the two finality statutes then applicable to Veterans Administration benefit systems was inapplicable to determinations made under the Administrator's authority to

declare benefit forfeitures due to fraud; and also inapplicable to any administrative setoff of an overpayment of a gratuitous benefit against nonforfeited contractual benefits (insurance). Certain comments of the court are notable in view of subsequent legislative and judicial developments. Those comments, at page 89, as to the authority of the Administrator were that:

> The language of the statute does not give him the power to enter judgment against the veteran in an ex parte proceeding, without notice and hearing. The mere fact that the government makes conclusive the discretion of the Administrator in granting the benefit does not carry with it a conclusiveness in discretion in taking it away retroactively. As we read the statute, Congress never attempted to vest in the Administrator a right to enter a judgment or to deprive a veteran of property without due process of law. (Emphasis added.)

Pending in Congress at about the same time was legislation (the Walter-Logan bill) which would have subjected virtually all actions of any administrative agency of the United States to judicial review. Both the House and Senate Judiciary Committees had refused to make exceptions in the measure which in turn caused concern in the authorizing committee having jurisdiction over veterans' benefits. Subsequently, that Committee approved, and the Congress enacted on August 17, 1940, a new and stronger "finality" provision (former 38 U.S.C. § 11a-2), which stated:

> Notwithstanding any other provisions of law, except as provided in [statutes permitting suits on VA insurance contracts (now 38 U.S.C. § 784)] the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions.

Reference to "mandamus" apparently was considered by the Veterans Administration drafters as unnecessary under the new rules of civil procedure.

In December 1940, the Walter-Logan bill was vetoed, with a Presidential message (H.R. Doc. No. 986, 76th Congress), citing an analysis by the Attorney General in which deleterious effects of the bill were listed as including judicial review of the granting or withholding of gratuitous Veterans Administration benefits. As to this and other effects of the measure, the Attorney General declared:

> The ultimate consequence would be not only to swamp the courts with a flood of minor administrative matters, but to retard and hamper the work of the executive branch of the Government. The discretion which must be exercised in performance of executive duties would, to a considerable extent, be transferred to the courts.

The 1940 Veterans Administration finality section was recognized in Van Horne v. Hines, 122 F.2d 207 (D.C. Cir. 1941), cert. denied, 314 U.S. 689, reh. denied, 314 U.S. 717 (1942), as ending any exceptions to the finality rule created by the Marsh ruling, supra. Citing the Supreme Court in Lynch, supra, and other cases as to the lack of vested rights in gratuitous Veterans Administration benefits, the court found that it was the intent of Congress to withdraw from court jurisdiction every final decision of the Administrator in relation to benefit payments in the nature of gratuities.

Prior to the codification in 1957, gratuitous benefits for various categories of veterans continued to be authorized under a number of different sections of the United States Code. The three principal finality measures were: 38 U.S.C. § 426; 38 U.S.C. § 705; and 38 U.S.C. § 11a-2.

Veterans' benefits legislation, other than insurance, was codified on June 17, 1957, by the enactment of Public Law 85-56. The substance of the 1940 finality provision was restated at Section 211, excepting from its reach matters arising under sections 784 (National Service Life Insurance), 1661 (education benefits for veterans of the Korean conflict),

1761 (war orphans education assistance), and under chapter 37 (loan guaranty). These provisions were carried forward in 38 U.S.C. § 211(a) with the 1958 reenactment of title 38 as positive law.

Subsequent challenges were received favorably by the Court of Appeals, District of Columbia Circuit, which narrowly construed the finality provisions of section 211(a). Those opinions which commenced with Wellman v. Whittier, 259 F.2d 163 (D.C. Cir. 1958), and culminated in Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967), held that the term "claim" related only to an initial claim for veterans' benefits and, therefore, the finality statute did not preclude decisions to discontinued benefits. The Tracy opinion became the springboard for approximately 450 actions in nature of mandamus by Philippine widows whose gratuitous benefits had been terminated under a Veterans Administration rule presuming remarriage in the existence of certain circumstances. Judgments against the Administrator were entered in a number of those cases, one of the grounds being that the Veterans Administration rule was not in accordance with supposed congressional intent in statute sections defining the term "widow" and setting out terms of benefit entitlement.

Those decisions of the Court of Appeals and the District Court of the District of Columbia, when called to the attention of Congress, resulted in the 1970 amendments to section 211(a) and to the sections of title 38 of the United States Code concerning widows. Section 211(a), as so amended, reads:

> (a) On and after October 17, 1940, except as provided in section 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise. (Emphasis supplied.)

The legislative history of the 1970 amendments, as set forth in the report of the Committee on Veterans' Affairs, H.R. Rep. No. 1166, 91st Cong., 2d Sess. (1971), leaves no doubt of the intent of the Congress to overturn the successful court challenges to the finality statute and to make unmistakably clear that judicial review of administrative determinations of the Administrator of Veterans Affairs under all circumstances, other than the specified exceptions involving contractual matters, was intended to be precluded.

In DeRodulfa v. United States, 461 F.2d 1240 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972), the effect of the Wellman and related cases was declared cancelled. With a lengthy analysis of the 1970 finality amendment as well as the preceding legislative history and judicial construction, the Court concluded, at page 1251, that section 211(a), as recently amended:

> Restores the law in this circuit to its pre-Wellman condition; it sets for naught the exception to non-reviewability which the Wellman line of opinions had carried out for administratively forfeited compensation awards. It now makes it perfectly plain that no court has authority to disturb in any way the Administrator's disposition of any claim therefor.

The Court, at page 1257, further stated that:

> We conclude that the fact that adjudication of claims for noncontractual benefits is confided to the Administrator of Veterans' Affairs does not alone afford ground for constitutional complaint. . . .
>
> The constitutional adjudications find common ground in the thesis, as expressed by the First Circuit, that "veterans" benefits are gratuitous and establish no vested rights in the recipients . . . [citing Milliken v. Gleason, 332 F.2d 122, 123 (1st Cir. 1964), cert. denied, 379 U.S. 1002 (1965); and the origin of that proposition in Lynch v. United States, 292 U.S. 571 (1934), and

> other Supreme Court decisions] and despite possible indication that the thesis may be waning, [with reference to Goldberg v. Kelly, 397 U.S. 254 (1970)] we are obliged to accept it unless and until it is disapproved. We think, too, that there is another predicate possessing at least an equal measure of vitality. The Supreme Court has declared that 'the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts;" [quoting United States v. Babcock, 250 U.S. 328 (1919), at 331], and, it may, "instead provide an administrative remedy and make it exclusive. . . ." [quote from Dismuke v. United States, 297 U.S. 167 (1936), at 172.]
>
> That is precisely what Congress did in the current version of Section 211(a). . .

The finality provisions have been sustained in Milliken v. Gleason, supra; Redfield v. Driver, 364 F.2d (9th Cir. 1966); Wickline v. Brooks, 446 F.2d 1391 (4th Cir. 1971). In general, the finality of the Administrator's decisions has been upheld even when those decisions were alleged to be arbitrary and capricious. Hoffmaster v. Veterans Administration, 315 F. Supp. 62 (E.D. Pa. 1970), aff'd, 444 F.2d 192 (3d Cir. 1971); DiSilvestro v. United States, 268 F. Supp. 516 (E.D.N.Y. 1966), rev'd on other grounds, 405 F.2d 150 (2d Cir. 1968., cert. denied, 396 U.S. 964 (1969).

Perhaps the most significant decision concerning the finality statute rendered following the 1970 amendments and the DeRodulfa decision was that rendered in 1974 by the Supreme Court in Johnson v. Robison, 415 U.S. 361. There the court held that section 211(a) does not bar Federal courts from deciding the constitutionality of veterans' benefits legislation.

The plaintiff in Robison was a conscientious objector who, being exempt from military service, had performed required alternative civilian service. After being denied educational benefits under the Veterans' Readjustment Benefits Act of 1966,

he brought a class action on the grounds that the provisions of the Act making him and his class ineligible for such benefits violated the first amendment's guarantee of religious freedom and the fifth amendment's guarantee of equal protection of the laws.

The initial issue confronted by the court was the Government's contention that section 211(a) precluded court review of the constitutionality of veterans' benefits legislation. After indicating that such a construction would raise serious questions concerning the constitutionality of section 211(a), at page 367, the court stated:

> Plainly, no explicit provision of § 211(a) bars judicial consideration of appellee's constitutional claims. That section provides that "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision . . ."
>
> The prohibitions would appear to be aimed at review only of those decisions of law or fact that arise in the administration by the Veterans' Administration of a statute providing the benefits for veterans. A decision of law or fact "under" a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts. Appellee's constitutional challenge is not to any such decision of the Administrator, but rather to a decision of Congress to create a statutory class entitled to benefits that does not include I-O conscientious objectors who performed alternative civilian service. [(Emphasis added by the court.)]

Thereafter, the court discussed the grounds upon which it based its conclusion that the most reasonable construction of section 211(a) is that its prohibitions do not extend to actions challenging the constitutionality of laws providing benefits for veterans.

First, the court found support for this narrow exception to the absolute fin ity provided by section 211(a) in the administrative practices of the Veterans Administration. After stating that the court will generally show great deference to an agency's interpretation of a statute when faced with a problem of statutory construction, the court cited a Board of Veterans Appeals decision in which the Board denied a conscientious objector's claim for educational assistance. Therein, the Board had also held that its decision did not reach the question of the constitutionality of the pertinent statute because this was not within the jurisdiction of the Board. The court stated, at page 3:3, that this Board of Veterans Appeals decision "accepts and follows the principle that '[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.'"

The court also examined the legislative history of the 1970 amendment of section 211(a), and concluded that the history does not demonstrate a congressional intent to bar judicial review of constitutional questions. According to the court, the legislative history of the 1970 amendment indicates nothing more than an intent to preserve the Congress' two primary purposes in enacting the no review clause.

These two purposes were to prevent an overwhelming burden on both the Veterans Administration and the courts that would result from permitting judicial review and to prevent the courts from becoming involved in day-to-day determination and interpretation of Veterans Administration policy. Prior to the 1970 amendment, the continued existence of these two purposes was threatened by a line of decisions in the District of Columbia Circuit. Citing Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), the court, at page 373, stated that "neither the text nor the scant legislative history of section 211(a) provides the 'clear and convincing'

evidence of congressional intent required by this court before a statute will be construed to restrict access to judicial review" and concluded that section 211(a) does not preclude judicial review of the constitutionality of a statute authorizing veterans' benefits.

Even before the Supreme Court decision in Rotison, Federal district courts, relying on Goldberg v. Kelly, 397 U.S. 254 (1970), had assumed jurisdiction in suits challenging the constitutionality of Veterans Administration procedures. The Goldberg case did not involve veterans' benefits. The issue in Goldberg was whether the due process clause required the holding of an evidentiary hearing before terminating the continued receipt of welfare payments. Answering this question in the affirmative, the court asserted that welfare benefits are matters of statutory entitlements. As such, the court characterized them as being more like property interests than gratuities. In addition, the court stressed that compliance with the requirements of due process was necessary to protect a recipient's right to continued payments because termination of those payments might deprive an eligible recipient of the very means to live. As a result, the court concluded that an individual's interest in a pretermination hearing clearly outweighed the Government's interest in proceeding without such a hear[illegible] Therefore, due process requirements were violated wh[illegible]fare payments were terminated without providing an oppor[illegible]ty for a hearing prior to such termination.

Wallace v. The Administrator of Veterans Affairs, No. 14499 (D. Conn., Filed December 23, 1974), is the earliest of several unreported class action suits challenging the constitutionality of Veterans Administration procedures wherein the court assumed jurisdiction on grounds that an allegation of constitutional deprivation was a sufficient basis for jurisdiction.

In the Wallace case, the veteran's partial disability evaluation was temporarily increased to total disability during a period of hospitalization and convalescence. After hospital discharge, his evaluation was reduced to the prehospital level. Although Mr. Wallace had received notice of the

reduction as provided by 38 C.F.R. § 3.105, he filed suit alleging denial of due process because the Veterans Administration failed to grant a hearing prior to the reduction.

The court denied the Government's motion to dismiss for lack of jurisdiction based upon the prohibition in section 211(a). The court found that the plaintiff was not seeking review of a decision of the Administrator but, instead, was seeking enforcement of his due process rights to notice and a hearing prior to a decision of the Administrator to modify or terminate benefits. The court concluded that the principles established in Goldberg v. Kelly, supra, were dispositive of questions presented in Wallace.

After scrutinizing Veterans Administration procedures, the court ordered a physical examination by a court-appointed physician. The court dismissed the action after the examining physician confirmed the reduced evaluation and Mr. Wallace withdrew his hearing request. The Wallace case resulted in amendment of 38 C.F.R. § 3.103 to strengthen due process requirements by establishing more rigid guidelines for notice standards to clearly define the information to be furnished a claimant including that regarding hearing and appellate rights.

Since 1974, several Federal district courts have expanded the Robison holding as a basis for assumption of jurisdiction in suits alleging deprivation of due process under Veterans Administration adjudicative procedures. This has been coupled by an increasing tendency of some courts to insist upon review of the merits of the case prior to determining the jurisdictional issue. These courts have reasoned that jurisdiction depends on whether constitutional rights have been abridged as is often asserted by the plaintiff. Courts are particularly reluctant to dismiss actions involving hearing rights which cite the Goldberg case as precedent.

Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1975), a recent case challenging Veterans Administration adjudicative procedures, was filed by Mrs. Marian Plato when her pension

payments were suspended in May 1974. Mrs. Plato was receiving death pension payments after an administrative decision held her free from fault in an estrangement from the veteran and thereby meeting the continuous cohabitation requirement of 38 U.S.C. § 101(c). Payment suspension resulted from information submitted by Mrs. Plato on her income questionnaire regarding her illegitimate child born during the marital estrangement. She instituted suit when she was notified of the suspension, and requested the opportunity to submit evidence to establish the veteran's possible condonation of her infidelity. She alleged abridgment of her constitutional right to due process in that she was not given an opportunity for a hearing prior to suspension of her pension payments.

While a Government-filed motion to dismiss was pending, the court certified the suit as a class action. Robert Trail then moved to intervene, stating he had been notified his pension payments would be suspended or terminated because his income questionnaire indicated his income might be excessive. He, too, alleged due process deprivation in that he had not been granted a hearing until after suit was filed; the court rejected the Government's argument that the case was rendered moot.

The court's memorandum opinion, filed May 6, 1975, addressed jurisdictional and constitutional issues simultaneously, holding that the section 211(a) prohibition against judicial review of decisions of the Administrator did not exempt the Administrator's procedural policies from constitutional review by Federal courts. The court cited the Robison case, supra, in support of its position. The court then held jurisdiction existed under the mandamus statute, 28 U.S.C. § 1361, despite precedent cases holding that section 1361 does not bestow jurisdiction on the court absent independent jurisdiction under another statute. Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir.), cert. denied, 385 U.S. 831 (1966). The court said constitutional interpretation is not committed to agency discretion, but is manifestly a judicial function and found against the Veterans Administration assertion that procedural matters are solely within the Administrator's discretion.

After assuming jurisdiction, the court scrutinized Veterans Administration hearing procedures, reviewing the recent spate of Federal cases dealing with an individual's right to a hearing before an agency may withdraw or reduce a significant property right. The court then followed the Goldberg doctrine, declaring the agency's failure to hold hearings prior to suspension, reduction, or termination of benefit payments violated constitutionally mandated due process requirements and indicated it would issue a permanent injunction requiring the Veterans Administration to amend its procedures to provide such hearings.

The Department of Justice declined the Veterans Administration request for an appeal to clarify the Plato court's expansion of the Robison doctrine. As a result, the status of the law in this area is to sustain jurisdiction in cases where the constitutionality of either veterans' benefits legislation or Veterans Administration procedures is questioned.

Several recent cases have challenged Veterans Administration regulations in the educational assistance program, and have resulted in nearly identical decisions on the issue of reviewability of Veterans Administration regulations. The first, and most important, of these cases was Wayne State University v. Cleland, 590 F.2d 627 (6th Cir. 1978), in which the Government argued in its appeal of a district court decision that section 211(a) precludes judicial review of the validity, i.e. the substance, of Veterans Administration regulations and, in the alternative, that the Administrator had sufficient authority under 38 U.S.C. § 210 to promulgate the particular regulations in question. The Circuit Court agreed with the District Court's finding that section 211(a) does not preclude challenges to the Administrator's authority to promulgate regulations, basing its opinion on three factors.

First, the court found that the reasoning of the Supreme Court in Robison, supra, that application of section 211(a) to constitutional challenges would not serve the two primary purposes of the statute was equally appropriate in the Wayne State case. The court stated at page 631:

> Suits challenging the authority to promulgate regulations will not involve the federal courts in the day to day operations of the VA. Neither will our construction of § 211(a) spawn suits requesting federal courts to second guess the Administrator on the merits of particular claims

> for benefits or termination of such benefits. Suits challenging statutory authority of the Administrator will not involve the courts in the complex and technical niceties of VA policies, but rather will seek a determination where the regulations have been promulgated pursuant to a congressional grant of authority.

Second, the court noted that a construction of section 211(a) to bar judicial review of Veterans Administration regulations would require finding a congressional intent to insulate from judicial review the limits of the Administrator's authority. After noting that such a construction is not supported by the legislative history of section 211(a), and that such a construction would raise serious doubts about the statute's constitutionality, the court at page 632 stated that: "neither its text nor its scant legislative history provides the 'clear and convincing' evidence of congressional intent required by the Supreme Court before a statute will be construed to restrict access to judicial review."

Finally, the court stated that its review of the cases interpreting section 211(a) further demonstrated its inapplicability to challenges to the Administrator's authority to promulgate regulations. Citing a number of cases, the court at page 632 stated:

> The cases where section 211(a) has barred judicial review have all involved suits challenging the Administrator's decisions concerning individual claims for benefits or terminations of existing benefits. No decision of the Supreme Court or this court has construed section 211(a) to bar judicial review of the Administrator's authority to promulgate regulations.

Wayne State was followed in two subsequent cases where students and schools challenged the constitutionality or legality of Veterans Administration regulatory provisions. In Merged Area X v. Cleland, 604 F.2d 1075, 1078 (8th Cir. 1979), the court stated that secton 211(a) "was not designed to preclude judicial review of a challenge to the Administrator's

authority to promulgate regulations . . . . ." Similarly, the case of Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980) cited and followed Wayne State on the point of judicial review. It is interesting to note that Veterans Administration has not fared badly under this theory, since in each of the three the agency prevailed on the merits, and our regulations were determined to be valid.

In a similar kind of challenge to education procedures, the 9th Circuit Court of Appeals found that due process required pretermination notice and hearings in educational assistance cases. Devine v. Cleland, 616 F.2d (9th Cir. 1980). However, there were no statutory or regulatory provisions setting out procedural requirements for the Veterans Administration to follow, so that the court was concerned with its jurisdiction to review the questions. In other words, if no statute or regulation existed to challenge constitutionally, the question was whether the court could take jurisdiction under Johnson v. Robison, supra.

The court stated that it would not review the "substance" of a decision by the Administrator, but would take jurisdiction only when the constitutionality of acts of Congress was challenged. 616 F.2d at 1084. Holding that the absence of procedural protections in the statute, coupled with the failure of the Administrator to establish a regulatory procedure under his delegated authority, was the equivalent of a statutory provision, the court allowed the constitutional challenge. In that case, pretermination procedures were required, but the court specifically stated that § 211(a) prevented any substantive review of the decisions reached by the Administrator to terminate benefits following a hearing.

Based on the above, two clear lines of authority may be recognized. First, as explained in Johnson v. Robison, supra , section 211(a) precludes judicial review of individual benefit decisions. The second line of cases, following Wayne State v. Cleland, supra , clearly holds that section 211(a) may not be interpreted to preclude judicial review of the validity of agency regulations.

These cases involve a detailed analysis of the basic authorizing statute and the congressional intent to determine whether the regulations issued are within that statutory authority.

In the few recent cases which do not involve statutes or regulations, there is a split of authority. In a 1977 ruling by the 5th Circuit in Anderson v. Veterans Administration, 559 F.2d 935, the veteran had argued constitutional deficiencies in the hearing procedures employed in his claim, and that he was otherwise unconstitutionally discriminated against in the denial of benefits. The court flatly held that since the constitutional challenge was directed at the action of Veterans Administration officials rather than the validity of legislation, it did not fall within the Johnson v. Robison exception to section 211(a). This holding was followed in Cox v. Veterans Administration, 470 F. Supp. 1208 (N.D. Texas 1979).

On the other hand, the U.S. District Court for Vermont in Dumas v. Cleland, 486 F. Supp. 149 (D. Vt. 1980), approached a similar question entirely differently. At issue there was the VA's termination of a veteran's wife's status as spouse-payee of his disability compensation. Ruling that it had jurisdiction to review that matter (although finding for the Government on the merits), the court held that section 211(a) bars review only of those agency actions that involve interpretation or application of a particular provision of the statute to a particular set of facts, and does not bar a claim that the Veterans Administration's procedures violate due process.

Taking the middle ground was Carter v. Cleland, 643 F.2d 1 (D.C. Cir. 1930). Plaintiffs, who had been denied entitlement to survivors' benefits on the basis that they had been separated from their veteran-husbands for years prior to the veterans' deaths, and had each given birth to children by a man other than her husband during the separation, sought judicial review after unsuccessful BVA appeals. They alleged that an administrative guideline in a VA adjudication manual, which directed that giving birth by another during separation would generally preclude one from receiving survivors' benefits, was unconstitutional or, in the alternative, exceeded the Administrator's statutory authority to promulgate regulations. The court rejected both arguments, finding that the challenged guideline was neither an irrebuttable presumption so as to raise a due process question,

nor a regulation so as to require a Wayne State analysis. Accordingly, the court held that plaintiffs were really attacking the Administrator's final decisions on their individual benefit claims, and that such challenges were beyond the court's jurisdiction because of section 211(a).

ATTACHMENT B

VETERANS ADMINISTRATION ADJUDICATION AND APPELLATE PROCEDURES

Current Veterans Administration claims procedures are designed to afford full due process to claimants and to minimize the possibility of arbitrary and capricious decisions or abuse of discretion by the Administrator. These procedures are defined by statutes and regulations which charge the Veterans Administration with the duty to assist the claimant in developing the facts pertinent to his or her claim and to render a decision which grants the claimant every benefit that can be supported in law, 38 C.F.R. § 3.103. Further, if the evidence presented raises a reasonable doubt regarding service origin, degree of disability, or any other point, regulations require that doubt is to be resolved in favor of the claimant, 38 C.F.R. § 3.102.

The most salient characteristic of the Veterans Administration claims process is its informality. In most cases, a claimant may submit his own application without need of any assistance, and without an attorney. If a claimant desires assistance, or needs advice, he has access to Veterans Administration employees who specialize in answering inquiries and assisting in the development and submission of claims. At the same level, there exists a wide network of veterans' service organizations which furnish competent claims specialists at no charge to assist a claimant in the presentation of his claim.

Veterans Administration adjudicatory procedures are intended to be nonadversary in nature. In almost all cases, a claimant need do nothing more than file his claim. Although adjudication of the claim will actually take place at one of our 58 regional offices, the claimant may personally file or mail a claim to any Veterans Administration facility. The Veterans Administration maintains a number of Veterans Services offices in various states to assist claimants. In addition, Veterans Benefits Counselors are assigned to hospitals, domiciliaries, nursing homes and out-patient treatment centers to assist claimants in this regard. All claims received are forwarded to the appropriate regional office for adjudication.

Adjudication of the claim can generally proceed without the necessity of the claimant appearing at a hearing, producing further evidence, or presenting witnesses, etc.

The agency will procure the records of military service and medical treatment basic to most claims. Where these records prove insufficient to establish the benefit being sought, the claimant is clearly told, whenever possible, what evidence would be required and what sources are acceptable. As noted, it has always been the policy of the agency to resolve all reasonable doubt in favor of the claimant, and in cases where service medical records do not substantiate the claim, lay evidence of the existence of a condition can be accepted. All evidence which has been submitted by a claimant, or is obtained by the agency, is considered in arriving at a determination on the claim.

Once a decision has been reached, the Veterans Administration must provide the claimant with notice of the decision as well as notice of hearing and appellate rights. (A sample of the form providing this notice is attached as Exhibit 1.) A claimant is entitled to a hearing on any issue at any stage in the proceedings. At a hearing, claimants may produce witnesses to testify on their behalf and may adduce evidence of any nature whatsoever in support of their claim. If the decision at issue is one rendered by a rating board, the hearing is conducted by the rating board members who participated in the decision. If the hearing relates to other than a rating decision, it is held before a panel of three members, including the person who made the initial decision. While the right to question witnesses present is provided by the hearing procedures, there is no requirement for the Administrator to subpoena witnesses required by the claimant. Although the Administrator has subpoena authority pursuant to 38 U.S.C. § 3311, it is discretionary and seldom exercised to require the appearance of a witness at a hearing.

Any decision with which a claimant disagrees may be appealed within the agency. An appeal is initiated by filing a Notice of Disagreement with the action in question within one year from the date of notificiation thereof. This can be a simple declaration of disagreement with such action. On receipt of a Notice of Disagreement, the regional office reevaluates the veteran's claim. If the denial is continued, the claimant is provided, usually within 90 days of receipt of

the Notice of Disagreement, with a Statement of the Case. The provisions of 38 U.S.C. § 4005 require that the Statement of the Case contain a summary of the evidence, citation or discussion of the pertinent laws and regulations, and the decision on the issue as well as the reasons therefor. The Statement of the Case is designed to assist the claimant to understand the law and the evidence relied upon, as well as the evidence lacking to establish entitlement. With the Statement of the Case, the claimant is provided with a form which provides him with instruction for completing his Substantive Appeal. (A sample of this form is attached as Exhibit 2.) The claimant is also notified of his right to appear at a personal hearing before the Board of Veterans Appeals in Washington, D.C. The personal hearing may also be held before a traveling section of the Board of Veterans Appeals which makes periodic appearances at regional offices. In lieu of either of these alternatives, a claimant may also request a hearing on appeal before members of the regional office, the transcript of which is forwarded to the Board of Veterans Appeals in Washington.

Following any hearing and the timely receipt of a Substantive Appeal, the case is certified to the Board of Veterans Appeals. After a complete and independent review of the claim on the basis of all of the evidence of record, the Board renders its decision. The Board's action may be to allow the claim, deny it, or remand the case to the regional office having jurisdiction for further development. In the absence of obvious error of a material and reversible nature, the Board's decision is final. Section 4004 of title 38 requires that all Board decisions contain separately stated findings of fact and conclusions of law. As a matter of formal policy all Board decisions contain a summary of the contentions and evidence, a concise statement of applicable laws and regulations and a discussion and evaluation intended to answer contentions and afford a complete explanation of the issue disposition.

Over the years, the Veterans Administration has constantly reviewed and evaluated its procedures to comply with the evolving concept of due process. Due process provisions for compensation cases have been in effect since long before Goldberg v. Kelly, supra, and its progeny, including the Plato case, supra. As early as 1946, the Veterans Administration by regulation provided for notice

and opportunity for a hearing prior to reduction of a compensation award because of a change of physical condition. In 1955, that procedure was broadened to include circumstances where severance of service connection was proposed due to administrative error in an earlier grant of benefits. As the result of extensive hearings conducted by the House Committee on Veterans' Affairs in 1960 and 1962, statutory and regulatory amendments were adopted which provided that reduction of compensation occur only at the end of the year where such reduction was based on an unexpected change in the status of a veteran's dependents, e.g., if a divorce occurred or if a child married during the preceding year. Under this provision, the veteran received notice of a change in benefit payments and an opportunity for hearing well before any reduction in payment actually occurred.

Similar changes were made in the other benefit programs to delay reduction or termination of payments due to a change in dependency or in financial status until the end of the calender year in which the change occurred. Thus, an individual receiving benefits was provided an opportunity for hearing or to submit controverting evidence prior to the effective date of the change in payments. An additional change was made following the Plato decision when the Veterans Administration amended its procedures to provide for notice and opportunity for hearing before reducing, suspending, or terminating a running award for pension benefits. Those same procedures were later expanded to include persons receiving dependency and indemnity compensation and death compensation.

In addition, agency procedures concerning incompetency determinations were recently amended to provide for notice and opportunity for hearing prior to a rating of incompetency or suspension of payments on grounds of alleged incompetency. The same due process provisions were extended to allegedly incompetent, nonveteran beneficiaries. Under the changed procedure, an individual may not be considered incompetent by the Veterans Administration without having had an opportunity to contest the finding of incompetency. Moreover, the supervised direct pay program for incompetent beneficiaries has been modified to limit the period during which partial payment of the available benefit could continue. The change is consonant with the purpose of the supervised direct pay program, which is to determine whether a beneficiary is capable of handling funds.

In addition, procedures were modified to provide notice and opportunity for hearing prior to restriction of funds of patients hospitalized in Veterans Administration facilities. Under this change, when a person is admitted as a patient to a Veterans Administration hospital or domiciliary, such person will be furnished notice of the hospital rules concerning deposit of personal funds and permitted an opportunity to contest any proposed restriction of funds.

Procedures were recently published to comport with due process requirements in cases where liability for overpayments has been assessed against a school for failure to report changes by individual student veterans. The change broadens the scope of due process previously provided in school liability cases. The notice provisions are more clearly defined and hearing procedures enlarged to include a prehearing conference. The prehearing conference allows for defining and clarifying issues and enables school officials to document evidence for submission at the later hearing.

This same concern to provide due process to veterans is also demonstrated by changes in appellate procedures. For example, in the early 1960's, concern was expressed over the absence of judicial review of decisions of the Administrator. As a result, the House Committee on Veterans' Affairs conducted hearings in 1960 and 1962 on several bills proposing court review. During the course of these hearings, it was established that the interests of veterans would be best served by enactment of certain procedural changes rather than subjecting Veterans Administration decisions to judicial review. In general, these changes were designed to insure that the veteran not be denied due process of law as defined by the standards of that era.

Specifically, these changes were patterned after findings obtained by a study of the appellate procedures of the British Pension System. This study determined that the English appellate system was not a judicial system in the strict sense. Although the English system includes appellate bodies designated as tribunals, they are not true courts as we know them. Instead, they function as administrative boards whose practical operations are not too different from the operations of the Board of Veterans Appeals.

The statutory procedural changes that resulted from the hearings have remained substantially the same to the present day. Perhaps the most important of these changes was the requirement that a claimant be provided with a Statement of the Case. As explained above, a Statement of the Case provides a claimant with both a summary of the evidence and law upon which the agency reached its initial decision. This, of course, provides the claimant with all of the information necessary to enable him to present the best possible arguments to support his claim on appeal. This constituted a substantial modification in our earlier procedures which merely provided a claimant with a brief notice of the reason for the disallowance of his claim without a detailed discussion of the evidence, regulations, or laws upon which that disallowance was made.

Another procedural change that resulted from the hearing and which was also patterned on the British Pension System was the authorization to use independent medical experts to resolve conflicts of evidence. In enacting this legislation, Congress recognized that the use of such experts was warranted by the medical complexity and controversy that could arise in an appeal case. Congress also recognized the necessity of insuring the complete independence of such experts by providing that arrangements be made with recognized medical schools or clinics to provide advisory medical opinions. These arrangements were to provide that the actual selection of the expert in any individual case was to be made by an appropriate official of the medical school or clinic, not by the agency.

A final change in the Board of Veterans Appeals' decision-making process which resulted from the Committee hearings was the elimination of the Board's participation in the development and formulation of agency policy. Although this separation of function was not accomplished by legislation, it was believed necessary to achieve judicial detachment and autonomy. We believe that the fact that such a change could be achieved without legislation provides an example of the agency's willingness and desire to modify our procedures whenever necessary to insure fair and thorough adjudication of a veteran's claim for benefits.

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We believe these changes, which are generated in part by court challenges and in part by the agency's own continuing independent review of its regulations, are positive changes which provide veterans increased procedural protection which corresponds with the law's evolving concept of "due process." In addition, we believe that the current Veterans Administration procedures, which incorporate those changes, meet the requirements of fundamental fairness and, in fact, compare favorably with procedures of other governmental agencies or departments administering benefit programs. For example, a Veterans Administration claimant is by regulation entitled to a hearing at any stage of the administrative processing. By contrast, in Social Security Administration cases, a hearing is not available until the appellate level. Finally, we believe that our procedures remain attuned to the needs of the veterans we serve and will enable the agency to continue to provide maximum services to veterans of all eras.

NOTICE OF PROCEDURAL AND APPELLATE RIGHTS

We have based our decision on the evidence of record in your case and the applicable law. This explains your procedural and appellate rights in connection with this decision.

REPRESENTATION. You may be represented, without charge, by an accredited representative of a veterans organization or other service organization recognized by the Administrator of Veterans Affairs, or you may employ an attorney to assist you with your claim. Typical examples of counsel who may be available include attorneys in private practice or legal aid services. The services of a recognized attorney are subject to a maximum fee limitation of $10, set forth in 38 U.S.C. 3404(c). Expenses incurred in the prosecution of a claim must be approved in accordance with 38 C.F.R. 14.650 prior to demanding or receiving reimbursement from the claimant. If you desire representation, let us know and we will send you the necessary forms. If you have already designated a representative, no further action on your part is required.

NEW EVIDENCE. You may submit additional evidence to strengthen your claim. It is in your interest to send us any new evidence as promptly as possible. We will carefully consider it and let you know whether it changes our decision.

PERSONAL HEARING. If you desire a personal hearing to present evidence or argument on any point of importance in your claim, notify this office and we will arrange a time and place for the hearing. You may bring witnesses if you desire and their testimony will be entered in the record. The VA will furnish the hearing room, provide hearing officials, and prepare the transcript of the proceedings. The VA cannot pay any other expenses of the hearing, since a personal hearing is not required.

APPEAL. You may appeal our decision to the Board of Veterans Appeals at any time within one year from the date of this letter if you believe the decision is not in accord with the law and the facts now of record. You can start the appeal process by filing a Notice of Disagreement. You may do this by writing a letter to this office stating that you wish to appeal. If more than one benefit is involved, you should identify the benefit or benefits for which you are appealing. If you decide to appeal, we will advise you further as to your procedural rights as your claim progresses through the several states of the appeal process.

VA FORM AUG 1978 1-4107 EXISTING STOCKS OF VA FORM 1-4107 NOV 1975 WILL BE USED.

Exhibit 1

Form approved -
OMB No. 76-R0161

IMPORTANT: Read instructions on reverse side before filling in form. Complete all items fully. Send this appeal to the VA office which made the decision being appealed.

VETERANS ADMINISTRATION

APPEAL TO BOARD OF VETERANS APPEALS

1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print)	2. INSURANCE FILE NO., OR LOAN NO. (If pertinent)	3. CLAIM FILE NO. (Include prefixes)

4. IF APPEAL IS BEING MADE BY A PERSON OTHER THAN VETERAN, INDICATE RELATIONSHIP

☐ WIDOW ☐ CHILD ☐ MOTHER ☐ FATHER ☐ OTHER (Specify)

5. NAME OF CLAIMANT (If other than veteran)	6. ADDRESS OF CLAIMANT (Number & street, city, State & ZIP Code)

7. DATE OF DECISION BEING APPEALED	8. VA OFFICE WHICH MADE DECISION BEING APPEALED (City & State)

REPRESENTATION ➧ See Par. 6 of Instructions on reverse side.

HEARING ➧ See Par. 7 of Instructions on reverse side

9A. IS A HEARING DESIRED?	9B. IF YES, SPECIFY PLACE
☐ YES ☐ NO	☐ FIELD OFFICE ☐ WASHINGTON, D.C.

10. I TAKE ISSUE WITH THE DECISION CITED ABOVE AND HEREBY PETITION THE BOARD OF VETERANS APPEALS FOR RELIEF AS SET FORTH BELOW. *(State in specific detail the benefits sought on appeal and your reasons for believing that the action appealed from is erroneous. Follow carefully the instructions in paragraph 3 on the reverse side.)*

(Attach additional sheets, if necessary)

11. DATE	12. SIGNATURE OF CLAIMANT (Or representative)

VA FORM 1-9
REV. 1977

EXISTING STOCKS OF VA FORM 1-9, OCT 1975, WILL BE USED

MISSION OF THE BOARD OF VETERANS APPEALS

The Board of Veterans Appeals was established by law to decide appeals for benefits under laws administered by the Veterans Administration. (38 U.S.C. 4001 - 4009). Decisions are made by the Members of a Section of the Board, appointed with the approval of the President. It is the mission of the Board to decide appeals with sympathetic understanding and as promptly as possible, in order to grant all benefits to which veterans and their dependents and beneficiaries are entitled. Decisions are based on the entire record.

GENERAL INFORMATION

The [illegible] the right to have an adjudication decision reviewed on appeal by the Board of Veterans Appeals. (38 U.S.C. 4004(a)). If you want to appeal, the procedure is as follows:

(1) *Write the Veterans Administration office expressing disagreement or dissatisfaction with the decision on the claim.* This is a "Notice of Disagreement." It must be filed within 1 year from the mailing of notice of the decision (60 days where 2 or more persons claim same benefit).

(2) *A "Statement of the Case" is then sent the claimant and his representative by the Veterans Administration office.* It contains a summary of the facts, the applicable law and regulations and gives the reasons for the decision. Its purpose is to give the claimant sufficient information to complete his appeal in the most effective manner, if appellate review is still desired.

(3) *File a "Substantive Appeal."* This completes the appeal. Use this form (VA Form 1-9). Follow the instructions below.

PRIVACY ACT NOTICE

The information requested on this form is solicited under 38 U.S.C. 4005(d)(3)(4). It is used by the Board in identifying those areas of disagreement requiring appellate review, and is mandatory for completion of your appeal. The information may be disclosed outside the VA as permitted by law, or as stated in the "Notices of Systems of VA Records" which have been published in the Federal Register in accordance with the Privacy Act of 1974. Failure to furnish this information will have no adverse effect on any other benefit to which you may be entitled.

INSTRUCTIONS

IMPORTANT: Use this form to file a substantive appeal only after receiving the statement of the case referred to above.

1. WHO CAN SIGN A SUBSTANTIVE APPEAL. A substantive appeal may be signed by:

(a) The claimant personally.

(b) The accredited representative of a service organization provided a proper power of attorney is filed, or by an attorney provided a proper declaration of representation is filed.

(c) The guardian or other proper fiduciary of an incompetent claimant, or, if none, by the next of kin or next friend.

2. TIME LIMIT FOR FILING. A substantive appeal should be filed within 60 days after the statement of the case is mailed (30 days where 2 or more contesting claimants are involved). The 30-day period applies only where one claim is allowed and another denied, or allowance of one claim would result in a lesser payment to another claimant. An extension of time may be granted for good cause. A substantive appeal postmarked prior to expiration of the applicable period will be accepted as timely filed. (38 U.S.C. 4005(d)(3), 4005A(b)).

3. FORM OF APPLICATION. This form should be used for filing a substantive appeal. The benefit sought must be clearly identified. The date of the action appealed should be inserted in item 7. In completing item 10, care should be taken to set out errors of fact or law believed to have been made in the decision – that is, the reasons for disagreeing with the decision being appealed. Insofar as possible, relate all statements to specific items in the statement of the case. Identify any statement of fact in the statement of the case with which there is disagreement. The claimant will be presumed to be in agreement with facts stated to which no exception is taken. An appeal which is insufficient may be dismissed.

4. PLACE TO SEND SUBSTANTIVE APPEAL. The substantive appeal should be mailed to or filed with the Veterans Administration office which entered the decision being appealed.

5. SUBMISSION OF ADDITIONAL EVIDENCE. Where a substantive appeal is timely filed, a reasonable time will be granted, if requested, to file additional evidence before final consideration of the appeal. Any additional evidence should be submitted to the Veterans Administration office in which the appeal was filed.

6. REPRESENTATION. A claimant may be represented in the presentation of his claim by a recognized service organization provided a proper power of attorney is furnished, or by an attorney provided a proper declaration of representation is furnished. Only one representative is permitted at any one time in the prosecution of a specific claim. A form for filing power of attorney may be obtained from the local Veterans Administration office. (38 CFR 19.129, 19.130, 19.132)

7. HEARING ON APPEAL (Read carefully).

a. Hearing Granted, If Desired, And Conducted Informally. A hearing will be granted where a claimant or his representative expresses a desire for a personal appearance. The Board operates under Rules of Practice, but its procedures are informal. They are designed to make it easy for a claimant or his representative to present argument or testimony relevant and material to the appellate issue. Strict rules of evidence are not followed. All evidence on file is throughly considered regardless of whether a hearing has been held.

IMPORTANT: If a hearing is desired, such request should be made by completing items 9A and 9B, indicating the place of hearing – Veterans Administration field office or Washington, D.C. (See subparagraph c below.)

b. Who May Appear. The claimant, his representative, or both, may be heard. Either may arrange for the voluntary appearance of witnesses to testify.

c. Place of Hearing. A hearing may be held at one of the following places selected by the claimant or his representative:

(1) In Washington, D.C., before a Section of the Board of Veterans Appeals.

(2) In the Veterans Administration field office which originally decided the claim or, if more convenient, any other Veterans Administration field office which has appropriate personnel and technical facilities for conducting a hearing. In that event, the field office personnel act as a hearing agency for the Board of Veterans Appeals, but do not decide the appeal.

There is no provision for the Government to bear any expense incurred by the claimant, his counsel or witnesses in connection with attendance at a hearing.

8. ORDER OF CONSIDERATION. Appeals are docketed and considered in the order in which they are received except that for sufficient cause the Board may advance a case on the docket. (38 U.S.C. 4007.)

FOR VA USE ONLY

APPEAL RECEIVED (VA Date Stamp)

APPEAL RECORDED (Date)

Reverse side of VA Form 1-9

ATTACHMENT C

Attorney Fees

When considering the present attorney fee limitation, it is useful to examine the history of 38 U.S.C. § 3404 together with current veterans' representation practices. For over 100 years the law has contained provisions reenacted several times establishing a fee limitation for attorneys and claims agents representing claimants before the Veterans Administration for benefits purposes. As early as July 14, 1862, Congress limited the fees of agents or attorneys who assisted claimants. The basic fee at that time was $5, with additional small amounts authorized under certain conditions. The early legislative history gives some insight into the reasons for the fee limitation. During debates of the Act of July 8, 1870, 16 Stat. 194, 38 U.S.C. § 114, which increased the fee limitations to $25 (where the parties had agreed to a fee) and to $10 in all pension cases where no compensation for services was agreed to between the parties, Congressman Butler referred to claims agents as "the sharks who prey upon the pensioners."

A $3 fee limitation was established in 1918 under an amendment to the War-Risk Insurance Act, section 13 (40 Stat. 555). The fee limitation came in response to a rash of complaints that unscrupulous claims agents and attorneys were canvassing World War I veterans, fabricating claims, and harassing the families of veterans in initiating claims under the newly enacted War-Risk Insurance Act. These attorneys were apparently charging the upper limit of fees for work which was essentially clerical in nature. A flat fee limitation of $3 was fixed in connection with the presentation of claims. When the War-Risk Insurance Act was codified in 1924 as the World War Veterans' Act, the $3 limit was increased to $10, where it has remained.

It is quite clear from the floor debates that the intent of the legislation was to protect veterans from the predatory practices of unscrupulous claims agents and lawyers:

> It is not the intent of Congress that these mercenary claim-agent leeches should sap the blood of any financial benefit from the Government by putting up these false claims and establishing their right to this 10 percent commission for doing nothing, and doing what the Government itself intends to do in every individual case. (56 Cong. Rec., Pt. 5, p. 5222 (April 17, 1918))

However, it is also clear that the $3 fee limitation was intended to apply only to the minimal effort involved in filing an original application for benefits. The statutory language itself reads: ". . . payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed $3.00 in any one case . . . ." (40 Stat. 555)

Indeed legislative history makes clear that it was the expressed intent of Congress to exclude attorneys from any participation in presentation of claims beyond the assistance occasionally necessary in filling out application forms. ". . . [N]o claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four . . . ." (40 Stat. 555-56). Again the legislative history makes this clear:

> Unless there is still some joker we have not discovered, enactment of this bill will absolutely prevent applications being made by claim agents in behalf of beneficiaries under the act who would prevent them from obtaining all that is justly their due.
>
> There is no need for the intercession of agents or attorneys in these claims. . . . (56 Cong. Rec., Pt. 5, p. 5222 (April 17, 1918))

Yet the legislators were not entirely blind to the possible abuses of fee limitation, and in 1918 the possible hardships to veterans were foreseen:

> Mr. JUUL: Mr. Speaker and gentlemen, I am for this bill. I realize that it is a necessary bill and it should pass, but I am afraid that the $3.00 limitations and a provision in the penalty clause of the bill is going to work harm. I know of cases where three consecutive sets of papers in a single case are and have been missing for claims arising since the war, where allotments have not been made, and where people are suffering for the want of having the allotment made . . . . . If a claimant today (sic) in any State in the Union goes out and tells an attorney that he is

> limited to $3.00, that he has waited three or six months to get action on his claim, he is going to get no legal service that can be of any value to him, and I think a provision which would keep a claimant from applying to people who can be of service to him would be a mistake. (56 Cong. Rec., Pt. 5, p. 5225 (April 17, 1918))

It should be observed that Federal courts have consistently upheld the constitutionality of 38 U.S.C. § 3404(c) and 38 U.S.C. § 3405. See for example, Margolin v. United States, 269 U.S. 93 (1925); Hines v. Lowery, 305 U.S. 85 (1938); Gendron v. Levi, 423 U.S. 803 (1975), aff'g., sub. nom., Gendron v. Saxbe, 389 F. Supp. 1303 (C.D. Cal. 1975); and Hoffmaster v. Veterans Administration, 444 F.2d 192 (3d Cir. 1971).

In the Gendron case, supra, the three-judge district court panel reviewed the informal Veterans Administration claims procedure, and held that the $10 fee limitation, when viewed in the context of the entire procedure, including certification of representatives, did not deny a claimant either due process of law or equal protection of the laws. In reviewing congressional intent, the court stated, at page 1307:

> Congress, having in mind the availability to veterans of experienced lay persons to represent them in applying and qualifying for benefits, along with the facilities provided by the Government, as set forth in Section 3402, Title 38 U.S.C., appears to have concluded that the provisions for the representation of veterans was quite adequate. More elaborate procedural requirements involving adversary hearing would make proceedings necessarily burdensome and lengthy to the end that there would be long delays to the detriment of the veterans, as well as the creation of a great drain on the funds provided for their comfort. Having in mind the effective measures it had taken for the representation of veterans without charge Congress could

> properly limit to a nominal sum the fee paid to one representing a veteran as an agent or attorney without prejudicing the veterans rights.

The purpose of sections 3404(c) and 3405 was stated by the Court in Staub v. Johnson, 519 F.2d 298 (D.C. Cir. 1975), at page 300, to be as follows:

> While this statute does not by itself prohibit the payment of additional fees by the veteran himself, section 3405 imposes criminal penalties on anyone accepting fees in excess of these limits. The intent of this statutory scheme is to protect veterans from predatory fee practices by attorneys, but it also reflects a congressional judgment that VA proceedings are non-adversary and thus retained counsel are unnecessary.

Upon remand the court in Staub v. Roudebush, 424 F. Supp. 1346 (D.D.C. 1976), granted summary judgment and held that section 3404(c) did not deny due process and did not infringe upon the First Amendment right to free association and consultation with legal counsel. However, on appeal of the summary judgment order the court in Staub v. Johnson, 574 F.2d 637 (D.C. Cir. 1978), vacated the grant of summary judgment on the merits and remanded the case with directions to dismiss the complaint for lack of subject matter jurisdiction because the plaintiff had no standing to bring the action.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., July 21, 1981.

Hon. ALAN K. SIMPSON,
Chairman, Committee on Veterans' Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request of May 4, 1981, for the views of this Office on S. 349, the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

In its report and testimony before your Committee on S. 349, the Veterans' Administration explained in detail its reasons for concluding that this legislation is neither necessary nor advisable.

We agree with the VA's position and, accordingly, do not favor enactment S. 349.

Sincerely,

JAMES M. FREY,
Assistant Director for
Legislative Reference.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., January 29, 1982.

Hon. ALAN K. SIMPSON,
Chairman, Committee on Veterans' Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request for the views of the Department of Justice on S. 349, a bill to amend title 38 of the United States Code to establish procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration. This legislation will represent a departure from existing practice with concomitant substantial costs to the Government. The Department defers to the Veterans' Administration with respect to whether such changes should be effected at this time. However, we do wish to comment on certain provisions of S. 349 which especially concern the Department of Justice.

The Department of Justice previously provided indepth comments on S. 364 (95th Congress), which also provided for judicial review of veterans' benefits determinations. One reservation we had concerning the bill was the lack of specific procedures for the adjudication of benefit claims. S. 349 (97th Congress) provides detailed procedures for claim disputes. For example, evidentiary practices, such as burden of proof, subpoena methods, and use of expert testimony, are set forth in sections 101 through 109. Sections 301 and 302 specify a procedure for judicial review in the United States district courts with review in the courts of appeals and the Supreme Court. We analyzed the procedures in sections 101 through 109, 301, and 302 of S. 349 and believe that these procedures provide adequate detail of the adjudicatory process.

Although the Department defers to the views of the Veterans' Administration on the need for the judicial review provisions in the bill, we note that courts tend to disfavor statutory restraints on judicial review and to construe such finality provisions narrowly. For example, the Supreme Court has held that the finality clause pertinent to the Veterans' Administration, 38 U.S.C. § 211(a), does not preclude judicial review of constitutional challenges to Veterans' Administration laws. *Johnson* v. *Robison*, 415 U.S. 361 (1974). Similarly, in *Wayne State University* v. *Cleland*, 590 F. 2d 627 (6th Cir. 1978), the Sixth Circuit held that 38 U.S.C. § 211(a) does not preclude review of claims that Veterans' Administration regulations exceed their statutory authority.

In our view, the enactment of this legislation will increase litigation and greatly increase the caseload of the Department of Justice. This increase is a natural result of a bill which provides access to the courts to a large class of claims not previously subject to judicial review. In the 1978 hearings on a predecessor bill to S. 349, the Department of Justice estimated that 21 attorneys and 24 clerical positions would be required to handle the estimated 4,600 cases that would arise annually under the bill. S. Rept. No. 96–178, 96th Cong., 1st Sess. 131: The cost of this expansion was projected to be $885,000 for personnel and $535,000 for support costs, totaling $1,420,000. Of course, the costs today for such personnel and support are much greater.

Nor would the impact of S. 349 be limited to the Department of Justice. In the 1978 hearings discussed above, we estimated that eight new district court judgeships and one new circuit court judgeship would be required for review of veterans' benefits cases. We noted that the Administrative Office of the United States Courts estimated that each new circuit court judgeship would require three staff positions, each new district court judgeship would require five new staff positions, and the projected caseload would require 46 deputy clerks. At that time, personnel costs for these positions were $2,054,000 and supporting costs were $978,000, for a total of $3,032,000. S. Rept. No. 96–178, 96th Cong., 1st Sess. 131. Once again, the current costs for such personnel and support are much greater.

The Department of Justice experienced significant caseload problems after the adoption of a similar provision for judicial review of social security benefits determinations. For example, in fiscal year 1980, 7,814 social security benefits cases were filed. These cases, combined with those filed in prior years, resulted in a pending caseload of approximately 20,000 cases. These cases account for almost 40 percent of the cases pending against the Federal Government. We would expect to encounter a similar expansion of our caseload were S. 349 enacted. We note that the Committee has decided not to include a substantial evidence test in the standard of review in an effort to avoid some of the caseload problems associated with the use of this test in the social security area. However, as the Committee recognized in its report on S. 330 (S. Rept. No. 96–178, 96th Cong., 1st Sess. 49 (1979)), the Committee's exclusion of the substantial evidence test would still permit factual review under an arbitrary capricious or abuse of discretion standard. While this narrower standard of review may decrease the number of appeals which will successfully raise evidentiary challenges, we doubt that it will decrease the number of cases which raise evidentiary challenges.

We reviewed comments submitted to your Committee by the American Bar Association (ABA) which question the accuracy of our projections. We remain convinced of the accuracy of our estimates. We note that most of the ABA's comments are undocumented and we remain confident that our evaluation of the potential effects of S. 349 on the Department of Justice is accurate. Further, our review of the comments suggest that they are erroneous. For example, the ABA contends that the effect of a veterans' benefits denial is less severe than that of a social security benefits denial and hence veterans' benefits decisions

are less likely to be appealed. The ABA claims that social security cases often turn on the "all or nothing" question of whether a disability prevents an individual from engaging in gainful employment, while the "vast majority" of veterans' benefits cases involve the upgrading of previously awarded disability ratings. Information received from the Veterans' Administration, which we understand was submitted to the Committee on August 28, 1981, in response to inquiries from Senator Simpson, indicates that only 24 percent of the cases before the Boards of Veterans' Appeals involve claims for an increased disability rating. Moreover, this information discloses that 41 percent of the veterans' benefits cases concern the question of whether an injury is service-related, which is as much of an "all or nothing" issue as whether an injury prevents any gainful employment. Thus, we believe that our previously furnished caseload and costs estimates are reasonable projections of the significant effect S. 349 will have on the Department of Justice.

We are also concerned that the attorney's fees provisions in section 401 of S. 349 do not clearly indicate the situations in which a court is empowered to award attorney's fees against the United States. We understand that the drafters of S. 349 intended attorney's fees to be awarded against the United States only "as an extraordinary remedy." 38 U.S.C. § 3404(i) (proposed language). Nonetheless, other sections of S. 349 could be read to provide for the award of attorney's fees against the United States. Specifically, the proposed language of 38 U.S.C. § 3404(d) provides that, in an action resolved "in a manner favorable to a claimant," the court "may determine and approve" attorney's fees "as part of its judgment." This language suggests that the attorney's fees will be incorporated into the judgment and be paid by the party paying the judgment, the United States. To remove this ambiguity, if the Committee decides to report out S. 349, we recommend that the proposed language of 38 U.S.C. § 3404(d) be amended to provide:

"If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court may determine a reasonable fee to be paid to the attorney by the claimant for representation in the action."

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General.

CHANGES IN EXISTING LAW MADE BY S. 349 AS REPORTED

In accordance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

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PART IV—JURISDICTION AND VENUE

* * * * * * *

CHAPTER 85—DISTRICT COURTS; JURISDICTION

Sec.

* * * * * * *

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purposes of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for

injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension, *except as provided for in subchapter II of chapter 71 of title 38.*

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 or section 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

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TITLE 38—UNITED STATES CODE

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PART I—GENERAL PROVISIONS

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CHAPTER 3—VETERANS' ADMINISTRATION; OFFICERS AND EMPLOYEES

SUBCHAPTER I—VETERANS' ADMINISTRATION

Sec.
201. Veterans' Administration an independent agency.
202. Seal of the Veterans' Administration.
203. Availability of appropriations.

SUBCHAPTER II—ADMINISTRATOR OF VETERANS' AFFAIRS

210. Appointment and general authority of Administrator; Deputy Administrator.
211. Decisions by Administrator; opinions of Attorney General.
212. Delegation of authority and assignment of duties.
213. Contracts and personal services.
214. Report to the Congress.
215. Publication of laws relating to veterans.
217. Studies of rehabilitation of disabled persons.
218. Standards of conduct and arrests for crimes at hospitals, domiciliaries, cemeteries, and other Veterans' Administration reservations.
219. Evaluation and data collection.
220. Coordination of other Federal programs affecting veterans and their dependents.
221. Rule making.

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Subchapter II—Administrator of Veterans' Affairs

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§ 211. Decisions by Administrator; opinions of Attorney General

(a) On and after October 17, 1940, except as provided in sections 775[.] *and* 784 *and subchapter II of chapter 71 of this title*, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

* * * * * * *

§ 221. Rule making

Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator shall be subject to the requirements of section 553 of title 5.

* * * * * * *

PART IV—GENERAL ADMINISTRATIVE PROVISIONS

Chapter		Sec.
51.	[Applications] *Claims*, Effective Dates, and Payments	3001
53.	Special Provisions Relating to Benefits	3101
55.	Minors, Incompetents, and Other Wards	3201
57.	Records and Investigations	3301
59.	Agents and Attorneys	3401
61.	Penal and Forfeiture Provisions	3501

CHAPTER 51—[APPLICATIONS] *CLAIMS*, EFFECTIVE DATES, AND PAYMENTS

SUBCHAPTER I—[APPLICATIONS] *CLAIMS*

Sec.
3001. Claims and forms.
3002. Application forms furnished upon request.
3003. Incomplete applications.
3005. Joint applications for social security and dependency and indemnity compensation.
3006. Furnishing of information by other agencies.
3007. Burden of proof; benefit of the doubt.
3010. Effective dates of awards.

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Subchapter I—[Applications] *Claims*

§ 3001. Claims and forms

(a) * * *

* * * * * * *

§ 3007. Burden of proof; benefit of the doubt

(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have

the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to his or her claim.

(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration involving a claim for benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.

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CHAPTER 57—RECORDS AND INVESTIGATIONS

* * * * * * *

Subchapter II—Investigations

§ 3311. Authority to issue subpenas

For the purposes of the laws administered by the Veterans' Administration, the Administrator, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer ~~oaths and affirmations, to aid claimants in the preparation~~ and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Veterans' Administration. Any person required by such subpenas to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States. *Subpenas authorized under this section shall be served by any individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing by registered or certified mail addressed to such individual at such individual's last dwelling place or principal place of business. A verified return by the individual so serving the subpena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service.*

* * * * * * *

CHAPTER 59—AGENTS AND ATTORNEYS

* * * * * * *

§ 3404. Recognition of agents and attorneys generally

(a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration. The Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in

good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans' Administration any agent or attorney recognized under this section if he finds that such agent or attorney—

(1) has engaged in any unlawful, unprofessional, or dishonest practice;

(2) has been guilty of disreputable conduct;

(3) is incompetent;

(4) has violated or refused to comply with any of the laws administered by the Veterans' Administration, or with any of the regulations or instructions governing practice before the Veterans' Administration; or

(5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

[(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—

[(1) shall be determined and paid as prescribed by the Administrator;

[(2) shall not exceed $10 with respect to any one claim; and

[(3) shall be deducted from monetary benefits claimed and allowed.]

(c) The Administrator shall approve reasonable attorneys' fees to be paid by the claimant, to attorneys recognized under this section, for representation before the Veterans' Administration in connection with a claim for benefits under laws administered by the Veterans' Administration, but in no event shall such attorneys' fees exceed—

(1) for any claim resolved prior to or at the time that a final decision of the Administrator is first rendered, $10; or

(2) for any claim resolved after such time, an amount in excess of—

(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 per centum of the total amount of any past-due benefits awarded on the basis of the claim.

(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

(i) the fee agreed upon by the claimant and the attorney; or

(ii) $500, or such greater amount as may be specified from time to time in regulations which the Administrator shall prescribe based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Administrator may, in the Administrator's discretion, determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee.

(d)(1) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant. When the claimant and an attorney have entered into an agreement under which the amount of the fee payable to such attorney is to be paid from any past-due benefits awarded on the basis of the claim and the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant, the fee so determined and allowed shall not exceed 25 per centum of the total amount of any past-due benefits awarded on the basis of the claim.

(2) If, in an action brought under section 4025 of this title, the matter is not resolved in a manner favorable to the claimant, the court, taking into consideration the likelihood at the time such action was filed that the claimant would prevail, may determine and allow a reasonable fee not in excess of $750 to be paid to the attorney by the claimant for the representation of such claimant.

(e) To the extent that past-due benefits are awarded in proceedings before the Administrator or a court, the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the decision of the Administrator or court making such award.

(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.

(g) For the purposes of subsections (c) and (d) of this section, claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

(h) In an action brought under section 4025 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fee and costs where the court finds that the position of the Administrator was not substantially justified or that special circumstances make an award just.

§ 3405. Penalty for certain acts

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in section 3404 or 784 of this title, [or] (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due [him] *such claimant or beneficiary, or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title.* Shall be fined not more than $500, or imprisoned at hard labor for not more than two years, or both.

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PART V—BOARDS AND DEPARTMENTS

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CHAPTER 71—BOARD OF VETERANS' APPEALS

SUBCHAPTER I—GENERAL

Sec.
4001. Composition of Board of Veterans' Appeals.
4002. Assignment of members of Board.
4003. Determinations by the Board.
4004. Jurisdiction of the Board.
4005. Filing of notice of disagreement and appeal.
4005A. Simultaneously contested claims.
4006. Administrative appeals.
4007. Docketing of appeals.
4008. Rejection of applications.
4009. Independent medical opinions.
4010. Adjudication procedures.
4011. Notice of procedural rights.

SUBCHAPTER II—JUDICIAL REVIEW

4025. Right of review; commencement of action.
4026. Scope of review.
4027. Remands.
4028. Survival of actions.
4029. Appellate review.

Subchapter I—General

§ 4001. Composition of Board of Veterans' Appeals

(a) There shall be in the Veterans' Administration a Board of Veterans' Appeals (hereinafter in this chapter referred to as the "Board") under the administrative control and supervision of a chairman directly responsible to the Administrator. The Board shall consist of a Chairman, a Vice Chairman, such number (not more than [fifty] *sixty-five*) of [associate] members as may be found necessary, and such other professional, administrative, clerical, and stenographic personnel as are necessary in conducting hearings and considering and disposing of appeals properly before the Board *in a timely manner.*

(b) Members of the Board (including the Chairman and Vice Chairman) shall be appointed by the Administrator with the approval of the President. *The provisions of section 5402 of title 5 shall not be applied to any member of the Board.*

(c) The Chairman shall submit a report to the appropriate committees of the Congress, not later than October 1, 1983, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, information specifying the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the twenty-four months preceding the prior fiscal year and the then current fiscal year, respectively, the average length of time a case was before the Board between

the time of the filing of an appeal and the disposition during the prior fiscal year, and the number of members and other professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as provided for by subsection (a) of this section.

§ 4002. Assignment of members of Board

The Chairman may from time to time divide the Board into sections of three members, assign the members of the Board thereto, and designate the chief thereof. If a section as a result of a vacancy or absence or inability of a member assigned thereto to serve thereon is composed of a number of members less than designated for the section, the Chairman may assign other members to the section or direct the section to proceed with the transaction of business without awaiting any additional assignment of members thereto. A hearing docket shall be maintained and formal recorded hearings shall be held by such [associate] member or members as the Chairman may designate, the [associate] member or members being of the section which will make final determination in the claim. A section of the Board shall make a determination on any proceeding instituted before the Board and on any motion in connection therewith assigned to such section by the Chairman and shall make a report of any such determination, which report shall constitute its final disposition of the proceeding.

§ 4003. Determinations by the Board

(a) The determination of the section, when unanimously concurred in by the members of the section shall be the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned, *after notice to the claimant of such additional information together with an opportunity to be heard in connection with such information*, reach a contrary conclusion.

(b) When there is a disagreement among members of the section the concurrence of the Chairman with the majority of members of such section shall constitue the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned, *after notice to the claimant of such additional information together with an opportunity to be heard in connection with such information*, reach a contrary conclusion.

§ 4004. Jurisdiction of the Board

(a) All questions on claims [involving] *for* benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board *after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law.*

[(b) When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.]

(b)(1) Except as provided in paragraph (2) of this subsection, when a claim is disallowed by the Board, it may not thereafter be reopened and allowed and no claim based upon the same factual basis shall be considered.

(2) Following such a disallowance, the Board (directly or through the agency of original jurisdiction, as described in section 4005(b)(1) of this title)—

(A) when new and material evidence is secured, shall, and

(B) for good cause shown, may

authorize the reopening of a claim and review of the Board's former decision.

(3) A judicial decision under subchapter II of chapter 71 of this title, upholding, in whole or in part, the disallowance of a claim shall not diminish the Board's authorities set forth in paragraph (2) of this subsection to authorize the reopening of a claim and review of the former decision.

(c) The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer.

[(d) The decisions of the Board shall be in writing and shall contain findings of fact and conclusions of law separately stated.]

(d) After reaching a decision in each case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact, law, and matters of discretion presented on the record; and

(2) an order granting appropriate relief or denying relief.

§ 4005. Filing of notice of disagreement and appeal

(a) * * *

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(5) The Board of Veterans' Appeals [will base its decision on the entire record and] may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

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§ 4009. Independent medical opinions

(a) When, in the judgment of the Board, expert medical opinion, in addition to that available within the Veterans' Administration, is warranted by the medical complexity or controversy involved in an appeal case, the Board is authorized to secure an advisory medical opinion from one or more independent medical experts who are not employees of the Veterans' Administration.

(b) The Administrator shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions at the request of the Chairman of the Board. Such arrangement will provide that the actual selection of the expert or experts to give the advisory opinion in any individual case will be made by an appropriate official of such institution.

(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and, after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. If the Board denies the request of such claimant for such an opinion, the Board shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for its determination. Actions of the Board under this subsection, including any such denial, shall be final and conclusive, and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, subchapter II of chapter 71 of this title to the contrary notwithstanding.

§ 4010. Adjudication procedures

(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence.

(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator, under regulations which the Administrator shall prescribe, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

(c) (1) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded opportunity—

(A) at a reasonable time prior thereto as well as during such proceeding, to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

(B) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations which the Administrator shall prescribe, pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

(C) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

(D) to submit rebuttal evidence;

(E) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

(F) to serve written interrogatories on any person, including any employee of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Administrator by the person to whom the interrogatories are directed or such person's representative.

(2) The fee provided for in paragraph (1)(A) of this subsection may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

(3) In the event of any objection filed under paragraph (1)(F) of this subsection, the Administrator shall, pursuant to regulations which the Administrator shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Administrator shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered.

(4) If any person upon whom interrogatories are served under paragraph (1)(F) of this section fails to answer or fails to provide responsive answers to any such interrogatories within thirty days after service or such additional time as the Administrator may allow, the Administrator shall, upon a statement or showing by the party who served such interrogatories of general relevance and reasonable scope of the evidence sought, issue a subpena under section 3311 of this title (with enforcement of such subpena to be available under section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within one hundred miles of where such person resides, is employed, or transacts business.

(d) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration may at any time disqualify himself or herself, on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator shall determine the matter as a part of the record and decision in the case.

(e) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board (1) shall constitute the exclusive record for decision in accordance with section 4004(a) of this title, (2) shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places, and (3) on the payment of a fee prescribed under section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for

the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

(f) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

§ 4011. Notice of procedural rights

In the case of any disallowance, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with disallowance after an initial review or determination, and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notice shall be on such forms as the Administrator shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration, (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, and (3) such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.

Subchapter II—Judicial Review

§ 4025. Right of review; commencement of action

(a) For the purposes of this chapter and section 3404 of this title—

(1) "final decision of the Administrator" means—

(A) a final determination of the Board of Veterans' Appeals pursuant to section 4004 (a) or (b) of this title; or

(B) a dismissal of an appeal by the Board of Veterans' Appeals pursuant to section 4005 or 4008 of this title; and

(2) "claim for benefits" means—

(A) an initial claim filed under section 3001 of this title;

(B) a challenge to a decision of the Administrator reducing, suspending or terminating benefits; or

(C) any request by or on behalf of the claimant for reopening, reconsideration, or further consideration in a matter described in clause (A) or (B) of this paragraph.

(b) Except as provided in subsection (f) of this section, after any final decision of the Administrator adverse to a claimant in a matter

involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within 180 days after the mailing to the claimant of notice of such decision pursuant to section 4004 of this title. Such action shall be brought against the Administrator in the district court of the United States for the judicial district in which the plaintiff resides or the plaintiff's principal place of business is located, or in the district court of the United States for the judicial district where the principal offices of the Board of Veterans' Appeals (established under section 4001 of this title) are located.

(c) The complaint initiating an action under subsection (a) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's records in the custody or control of the Veterans' Administration.

(d) The Administrator shall file, together with the answer to a complaint filed pursuant to subsection (a) of this section, a certified copy of the records upon which the decision complained of is based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court deems relevant to its consideration of the case.

(e) In an action brought pursuant to subsection (b) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (d) of this section, to enter judgment in accordance with section 4026 of this title or remand the cause in accordance with section 4026 or 4027 of this title.

(f) No action may be brought under this section—

(1) where the initial claim for benefits is filed pursuant to section 3001 of this title after the last day of the fifth fiscal year beginning after the effective date of this section; or

(2) with respect to matters arising under chapters 19 and 37 of this title.

§ 4026. *Scope of review*

(a) In any action brought under section 4025 of this title, the court to the extent necessary to its decision and when presented, shall—

(1) decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

(2) compel action of the Administrator unlawfully withheld;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), and conclusions of the Administrator found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) in the case of a finding of material fact made in reaching a decision on a claim for benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside. Before setting aside under this clause any finding of fact, the court shall specify the deficiencies in the record upon which the court would set aside such finding, and shall remand the case one time to the Administrator for further action not inconsistent with the order of the court in remanding the case. In so remanding a case, the court shall specify a reasonable period of time within which the Administrator shall complete the ordered action. If the Administrator does not complete action on the case within the specified period of time, the case shall be returned to the court for its further action.

(b) In making the determinations under subsection (a) of this section, the whole record before the court pursuant to section 4025(d) of this title shall be subject to review, and the court shall review those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Administrator be subject to trial de novo by the court.

(d) When a final decision of the Administrator is adverse to a party and the sole stated basis for such decision is the failure of such party to comply with any applicable regulation of the Veterans' Administration, the court shall review only questions raised as to compliance with and the validity of the regulation.

§ 4027. Remands

(a)(1) In any action brought under section 4025 of this title, the court shall, on motion of the Administrator made before the expiration of the time specified for the filing of an answer to a complaint filed pursuant to subsection (b) of such section, allow a single remand of a case to the Administrator for further review by the Administrator. If such review is not completed within ninety days after the date of such remand, the matter shall be returned to the court for its action.

(2)(A) At any time after the Administrator files an answer, the court may, in the exercise of its discretion, remand the case to the Administrator for further action by the Administrator.

(B) If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Administrator and order such additional evidence to be taken by the Administrator.

(C) In the case of a remand under subparagraph (A) or (B) of this paragraph, the court may specify a reasonable period of time within which the Administrator shall complete the required action.

(b) After a case is remanded to the Administrator under subsection (a) of this section, and after further action by the Administrator, including consideration of any additional evidence, the Administrator

shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of the findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, affirmation, or reversal was based. Any such modification, supplementation, affirmation, or reversal of the findings of fact or decision shall be reviewable by the court only to the extent provided in section 4026 of this title.

§ 4028. Survival of actions

Any action brought under section 4025 of this title shall survive, notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office.

§ 4029. Appellate review

The decisions of a district court pursuant to this chapter shall be subject to appellate review by the courts of appeals and the Supreme Court of the United States in the same manner as judgments in other civil actions.

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